

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF TEXAS
3 DALLAS DIVISION

4 PATRICK HENRY MURPHY JR.)
5 Respondent,)
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3:09-CV-1368-L-BN

VS.

DALLAS, TEXAS

WILLIAM STEPHENS, Director,
Texas Department of Criminal
Justice, Correctional
Institutions Division,
Respondent.

September 4, 2015

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

FOR THE PETITIONER:

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13 **ALSO PRESENT:** **MS. KELLY HICKMAN**
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17

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22
23 Proceedings reported by mechanical stenography and
24 transcript produced by computer.
25

1 EVIDENTIARY HEARING - SEPTEMBER 4, 2015

2 P R O C E E D I N G S

3 THE COURT: All right. Good morning. This is --
4 we're here in Case 3:09-CV-1368-L-BN, Patrick Henry Murphy Jr.
5 versus William Stephens for an evidentiary hearing the Court
6 has set to determine whether the exception to procedural bar
7 created in *Martinez v. Ryan* and extended to cases out of Texas
8 in *Trevino v. Thaler* will apply to either of the claims of
9 ineffective assistance of counsel asserted by Petitioner
10 Murphy.

11 I'll take appearances.

12 MR. GREENWELL: Jeremy Greenwell on behalf of the
13 Respondent, Your Honor.

14 THE COURT: All right.

15 MS. HICKMAN: Kelly Hickman for Petitioner, Your
16 Honor.

17 THE COURT: Okay. Ms. Hickman, we still don't have
18 an admission status for you. I mean, I hope I made this clear
19 Friday. I regret to do this, but I don't really feel
20 comfortable having you take witnesses today when -- I mean, I'm
21 not saying I personally doubt that you will be admitted, but --

22 MS. HICKMAN: Yes, sir. I understand, Your Honor.

23 THE COURT: Yes.

24 MS. HICKMAN: As I said on the phone, the clerk said
25 that I had within 21 days. I'm just waiting on a certificate

1 in good standing. I understand.

2 THE COURT: Yes.

3 MS. HICKMAN: And obviously, you know, we will follow
4 whatever you prefer.

5 THE COURT: Okay. All right. Well, let me -- let me
6 state for the record also that Mr. Murphy has consented in
7 writing not to be present for the hearing, so just to make that
8 clear. And with that, we can get started.

9 Mr. Dow?

10 MR. DOW: May I?

11 THE COURT: Uh-huh.

12 MR. DOW: I'm David Dow.

13 THE COURT: Yes.

14 MR. DOW: Judge, you would prefer that I examine the
15 witness rather than Ms. Hickman? She is -- she's admitted to
16 the Bar.

17 THE COURT: Well, she's not admitted to this court,
18 though.

19 MR. DOW: That's correct. That's correct.

20 THE COURT: Yeah. I mean --

21 MR. DOW: So, you'd prefer that I --

22 THE COURT: I would. I would, yes.

23 MR. DOW: I understand.

24 THE COURT: Okay. All right. Mr. Dow, would you
25 like to call your first witness?

1 MR. DOW: Yes. Judge, we'll call Brook Busbee.

2 THE COURT: All right.

3 (Pause)

4 THE COURT: If you could raise your right hand.

5 (The witness was sworn)

6 THE COURT: Thank you. Please be seated.

7 BROOK BUSBEE, PETITIONER'S WITNESS, SWORN

8 DIRECT EXAMINATION

9 BY MR. DOW:

10 Q. Good morning, Ms. Busbee.

11 A. Good morning.

12 Q. I'm David Dow.

13 A. Yes, sir.

14 THE WITNESS: Can I get some water?

15 (Pause)

16 THE COURT: Thank you, Mr. Dow.

17 BY MR. DOW:

18 Q. Can you state your name for the record?

19 A. Brook A. Busbee.

20 Q. And can you please tell the Court your current occupation?

21 A. I'm an attorney and a part-time adjunct clinical professor
22 at SMU in the criminal defense clinic.

23 Q. What is the focus of your legal practice?

24 A. Criminal.

25 Q. Do you do a wide variety of criminal work?

1 A. Well, I don't do tickets, but I appear in Federal court
2 from time to time. I handle mostly felonies.

3 Q. Did you represent Patrick Murphy at his trial?

4 A. I did.

5 Q. Was Patrick Murphy the first capital defendant who you
6 represented?

7 A. No.

8 Q. Can you tell me the names of some of the other defendants
9 who you have represented who were facing possible death
10 sentences at the time of their trials?

11 A. Prior to Mr. Murphy?

12 Q. Prior to Mr. Murphy.

13 A. Mark Robertson and Licho Escamilla at that time were the
14 only two I had tried prior to Mr. Robertson -- I'm sorry --
15 Mr. Murphy.

16 Q. Do you recall how long before Mr. Murphy's trial you were
17 appointed to represent him?

18 A. Oh, yes. I was appointed before he had actually returned
19 to Dallas from Colorado. I don't recall the exact date, but it
20 would have been about 10 or 11 days after they were arrested.

21 Q. At the time that you were appointed, was co-counsel
22 appointed as well?

23 A. No. Molly Francis was the Judge of the 283rd on -- when
24 these cases came to her court, and she called in six lawyers to
25 be the chief counsel. And then she informed us that she would

1 like for us to choose our second chair, and I chose
2 Mr. Sanchez.

3 Q. Had you worked with Mr. Sanchez before?

4 A. No.

5 Q. When you and Mr. Sanchez divided responsibility for who
6 was going to do what in the Murphy trial, was that a
7 collaborative decision, or was that a decision that you made as
8 the lead counsel?

9 A. I made that decision.

10 Q. Do you currently -- and I don't mean on September the --
11 whatever today's date is. But, I mean, generally currently in
12 your practice do you continue to represent defendants facing
13 potential death sentences in Texas?

14 A. I'm on the death penalty wheel along with a number of
15 other people.

16 The last time I had a death penalty case go to trial,
17 I think, was two thousand -- well, it was -- Juan was the chief
18 counsel in that one. It was the retrial of Kenneth Thomas.
19 And that was -- I think we did that last summer, so that was
20 the last one. I do not currently have a case where the
21 Defendant is facing the death penalty.

22 Q. When you say you're on the wheel, does that mean that you
23 are eligible for capital appointments?

24 A. They -- like all districts in Texas, as you know, they
25 have criteria that you have to meet in order to be on the list

1 of people -- they just call it a wheel in Dallas County -- the
2 list of people who can handle a death penalty case, can be
3 appointed to one. They have a wheel for the first chair and a
4 wheel for the second chair with different educational and
5 experience minimums.

6 Q. Ms. Busbee, has an ineffective assistance of counsel claim
7 been raised against you with respect to any case where you were
8 the lead counsel and the defendant was a capital defendant?

9 A. Lead counsel? Well, in Licho Escamilla I was technically
10 the lead counsel, but I had not done a death penalty case since
11 I did Mr. Robertson by choice, because it just took too much
12 time back then.

13 And so while I was technically lead counsel, I chose
14 Wayne Huff with some 30 prior death penalty cases to be lead
15 counsel in Mr. Escamilla's case, and so he was the lead
16 counsel. And I believe that there were, as there seems there
17 always are, claims of ineffective assistance of counsel in
18 Mr. Escamilla's case.

19 So, I don't know -- the answer to that is yes, but I
20 wasn't truly the lead counsel.

21 Q. Have there been any cases since the time that you
22 represented Mr. Murphy where you represented a defendant facing
23 death who was, in fact, sentenced to death where an
24 ineffectiveness claim has been raised against you?

25 A. Indeed -- you're familiar with this. Mr. Lizcano, Juan

1 Lizcano, that's pending.

2 Q. Are you aware of the consequences in Texas of being found
3 ineffective in a capital murder trial?

4 A. I am.

5 Q. Can you tell the Court what those consequences are?

6 A. I could lose my board certification. I would never be
7 allowed to participate in the defense of another person charged
8 with capital murder. I would lose my job at SMU because I
9 would have -- they would not be able to insure me, I think,
10 with medical -- I mean with malpractice insurance, which is
11 required for student practice. So, there would be some
12 consequences to that determination.

13 Q. Does your awareness of those consequences exert an
14 influence on how you answer questions when you're being
15 questioned about your performance in a trial?

16 A. No.

17 Q. Do you know who represented Patrick Murphy on his direct
18 appeal?

19 A. John Tatum.

20 Q. Do you have a professional relationship with Mr. Tatum?

21 A. Mr. Tatum was the only person that was left, because --
22 and because Mr. Tatum had run a contested primary race against
23 Molly Francis's husband at the time, he wasn't appointed to any
24 other cases, but he was the only person I think that was an
25 appellate lawyer who was left.

1 Mr. Murphy was the last case to go to trial, and I
2 had to scramble -- I had to scramble around for experts because
3 everybody had been taken. And we had Mr. Tatum appointed.

4 It was my practice to get an appellate attorney
5 appointed during the trial to help with all the decisions that
6 had to be made, and it was just an extra lawyer that you get.

7 And we had -- when -- I think I had Vick Cunningham
8 appoint him.

9 THE REPORTER: I'm sorry. who?

10 THE WITNESS: Vick Cunningham was the Judge who
11 succeeded Judge Francis, and that's why we were able to obtain
12 him. That has come back to my mind. She did not care for
13 Mr. Tatum and probably would not have appointed him for the
14 reasons I just stated.

15 BY MR. DOW:

16 Q. I don't want to put words in your mouth, Ms. Busbee, but
17 would it be fair to say that the reason that Mr. Tatum was
18 appointed to represent Mr. Murphy on direct appeal was because
19 you selected him?

20 A. Yes.

21 Q. And at the time that you selected him, would it be fair to
22 say you selected him out of a field of one?

23 A. There may have been other appellate counsel. He's -- I
24 mean, he's well regarded, but he just had not been asked for
25 because of the personal problem, if it existed.

1 Q. You stated a moment ago that from time to time you asked
2 that direct appeal counsel be appointed -- be appointed at the
3 time of trial so that that lawyer can observe the trial
4 proceedings. Do you remember when Mr. Tatum was appointed?

5 A. You know, it will -- should be reflected in the records,
6 but I'm going to say it was prior to the time that we began
7 jury selection, because it's just a way for me to get, you
8 know, an extra set of -- an extra brain.

9 Q. Do you recall Mr. Tatum being in the courtroom during jury
10 selection?

11 A. I don't remember.

12 Q. Do you know who represented Mr. Murphy in his state
13 post-conviction proceedings in his 11.071 proceedings?

14 A. It was my understanding it was Mr. Fishburn.

15 Q. Do you know whether Mr. Fishburn has represented anybody
16 else that you have represented, either who you had represented
17 prior to the time of Mr. Murphy or since in post-conviction
18 proceedings?

19 A. I do not know. I don't know.

20 Q. Have you ever represented a death-sentence inmate in
21 11.071 proceedings?

22 A. I one time wrote a writ for a man named Brian Roberson
23 with the understanding that I would not go to Federal court.
24 It was a favor to Judge Keasler, because Judge Warder had been
25 elected as the judge and she couldn't obviously preside over

1 that. So that -- and that was in 1995. And that was the only
2 time I ever participated in the writ -- the capital writ
3 process.

4 Q. What was the name of the --

5 A. Brian Roberson, R-O-B-E-R-S-O-N.

6 Q. Do you remember who represented Mr. Roberson at trial?

7 A. Yes. Jeanette Drescher and Jake Johnson. And he's
8 deceased, but Jeanette is still available.

9 Q. When you prepared the 11.071 petition for Mr. Roberson,
10 did you contact the trial lawyer?

11 A. Yes.

12 Q. Did you obtain the records of the trial lawyers?

13 A. I did.

14 Q. Did Mr. Fishburn, who represented Mr. Murphy in post-
15 conviction proceedings, obtain your trial file?

16 A. No, sir.

17 Q. Did he contact you?

18 A. No, sir.

19 (Pause)

20 MR. DOW: Judge, may I approach the witness?

21 THE COURT: You may.

22 (Pause)

23 BY MR. DOW:

24 Q. I handed you, Ms. Busbee, what I believe are billing
25 records that you submitted in connection with your

1 representation of Mr. Murphy at his trial?

2 A. Yes, sir.

3 Q. Do you recognize those records?

4 A. I do.

5 Q. Did you create them yourself?

6 A. I did.

7 Q. Did you create those records from notes or other computer
8 or paper entries that you were making at the time you were
9 actually doing the work, or did you create them using the
10 benefit of hindsight?

11 A. Probably a little bit of both, to tell you the truth.
12 Now, of course, we have much more sophisticated time-keeping
13 programs, but I didn't have one at that time. In fact, I was
14 just looking in the one I have now, thinking perhaps I could
15 have these records. And we even tried it with the auditor, and
16 they destroyed them after seven years, so this is the first
17 time I have seen them since I turned them in.

18 Q. In view of the number of years that have passed since
19 you've looked at those, can you just glance at them quickly and
20 tell me whether you believe they accurately represent the time
21 that you spent both preparing for and conducting the Murphy
22 trial?

23 A. I don't know that it's every pay sheet. I don't know
24 where they came from. But this -- this is definitely my
25 handwriting and my mother's handwriting. She was a bookkeeper,

1 so she would expense my stuff back in.

2 MR. DOW: Judge, I just want to say for the record
3 that Ms. Busbee's mother passed away yesterday, and so we're
4 particularly grateful that Ms. Busbee was still comfortable
5 enough in view of that to attend today's proceeding.

6 Both Mr. Greenwell and the Attorney General's Office
7 very generously agreed that if Ms. Busbee did not feel
8 comfortable appearing today that we would ask Your Honor to
9 reschedule the hearing, but Ms. Busbee wanted to go forward.

10 THE COURT: Thank you.

11 THE WITNESS: I'm fine. I would tell you if I
12 wasn't.

13 THE COURT: Okay.

14 MR. DOW: I know you were. I just wanted to say for
15 the record that we're grateful for that.

16 THE COURT: Thank you for that, Mr. Dow.

17 And, Ms. Busbee, thank you for being here. I'm very
18 sorry for your loss.

19 MR. DOW: Your Honor, I would like to move that those
20 billing records be Exhibit -- be admitted as Petitioner Exhibit
21 1.

22 (Petitioner's Exhibit No. 1 marked)

23 THE COURT: Any objection?

24 MR. GREENWELL: We have no objection, Your Honor.

25 THE COURT: All right. They will be admitted as

1 Petitioner Exhibit 1.

2 (Petitioner's Exhibit No. 1 received)

3 BY MR. DOW:

4 Q. Is it typical for you, Ms. Busbee, to do work on a case
5 that you do not bill for?

6 A. Well, I used to be pretty bad about remembering what I had
7 done. I'm better at it now. But, yeah.

8 Q. The billing records refer to mitigation investigations or
9 mitigation investigation?

10 A. Some of them appear to be trial dates. Some of them
11 appear to be jury selection dates. I'm just -- I'm looking at
12 a number of different things here. Here's one for out of
13 court. I'm sure they reflect both.

14 Q. Yes. I -- what I would like to know at this point so that
15 we can explore those records further is that when you refer in
16 those records to mitigation investigation, can you tell the
17 Court what you mean by that?

18 A. Well, for instance, I traveled to Palm Springs at one
19 point to meet with Aunt Linda and -- I think it was his sister.
20 No, his sister lived -- I can't remember who the other person
21 was. Some other relative or cousin. I'm sure I billed them
22 for that.

23 I accompanied Dr. Vigen down to Temple for a day to
24 interview his father and sister. I went a couple of times with
25 my investigator to talk to his brother, so I'm sure there must

1 be a billing here for that someplace, if this is complete. I
2 don't -- I can't say.

3 Q. I'm asking a bad question. I mean to be asking when you
4 use the phrase "mitigation investigation," what do you mean by
5 that phrase?

6 A. Well, it would have included conversations with Dr. Vigen.
7 It would have included conversations with other experts that
8 may or may not have been used or consulted in mitigation -- you
9 know, preparing for the second portion of the trial. It would
10 have included, of course, those interviews with people.

11 Q. What is the purpose of a mitigation investigation?

12 A. It's to be able to present a sympathetic, if there is one,
13 view of the defendant's past and maybe -- obviously to educate
14 the jury as to whether or not the person would be a future
15 danger, if that's possible.

16 And as we have all noticed, it's the two-edged sword.
17 You have to bring forward things sometimes that some people may
18 consider mitigating and other people may consider detrimental
19 to your -- to your client's character. But you collect as much
20 information as you can and try to present it in such a way that
21 your client will live based on the jury's verdict.

22 Q. At the time you were appointed to represent Mr. Murphy,
23 what did you, Ms. Busbee, view as your principal goal or
24 objective?

25 A. Well, to save his life.

1 Q. And how does a mitigation investigation figure in the
2 context of that objective?

3 A. Well, in the course of these cases being tried, *Wiggins*
4 was decided. And so I don't know if it was after Mr. Rivas
5 or -- I can't remember. I guess it was Newbury, was the second
6 one.

7 So, there were three or four people who, you know --
8 that's when we had to decide what that meant and who we were
9 going to use to do it. And it was -- it was believed at that
10 time by capital trial counsel that we needed a psychologist to
11 organize that, and so everybody got a psychologist to help us
12 organize that.

13 But we -- at the time that we were appointed on
14 Mr. Murphy, there was not a judge in Dallas County who would
15 consider spending the kind of money that we ended up spending
16 on mitigation investigation. They allowed us to -- free hand
17 with investigators. There was a free hand with testing and
18 that kind of thing. But as far as having to pay somebody, an
19 expert, to gather information and do the kind of investigation
20 that was constitutionally required, as it turned out, that
21 was -- we would never have been able to obtain that much money.

22 You know what? Let me finish answering your
23 question. So, we began to look for a mitigation expert
24 subsequent to decision of witnesses. We didn't do it, of
25 course, prior to that time.

1 Q. And once you started to looking for a mitigation
2 investigator, did you find one?

3 A. It was not easy. There was -- I got a lot -- a lot of
4 solicitations from people who were like former police officers
5 and things like that, and I kind of tossed them in the trash.
6 I had been reading, of course, every record as it came through,
7 and I was reading the records of the testimony. And they were
8 putting mitigation experts on the witness stand, too, which is
9 now a bad practice, as it turns out.

10 But I called people, and I called people, and I
11 called. I finally -- you know, they had either been consulted
12 or they had actually actively participated in one of the prior
13 Texas Seven defendants.

14 But I called Mark Cunningham, who really doesn't make
15 a very good witness, but I know him, and he is that type of
16 psychologist. I called him on the phone, and I know him pretty
17 well. And I asked him, you know, did he have any
18 recommendations. And he had done some -- published some
19 scholarly works with Dr. Vigen and suggested that I talk to
20 Dr. Vigen.

21 And so Dr. Vigen traveled to Dallas. Unfortunately,
22 I don't know when that was. But he traveled to Dallas. I
23 liked him. I liked his resume, his CV. I thought he -- and he
24 seemed to be a person who would have a lot of influence on the
25 jury. He looked kind of like Father Knows Best, and he had a

1 religious back -- or a religious master's degree, and he had a
2 very good presentation, so I was happy to have him.

3 Q. For the sake of the record, Ms. Busbee, can you tell the
4 Court what the Texas Seven refers to?

5 A. Oh, yes. In 2000 -- in December of 2000 -- I might be
6 wrong about. It may be 1999. 2000. The -- seven men escaped
7 from the Texas Department of Corrections and went on a crime
8 spree, and they weren't arrested for almost six weeks, if I'm
9 not mistaken, and they were arrested in Colorado. In the
10 course of their crime spree they murdered a police officer in
11 Irving named Aubrey Hawkins, so -- and it was even a notorious
12 case at the time.

13 Q. And Mr. Murphy was one of those seven?

14 A. Mr. Murphy was one of the seven.

15 Q. I believe that you said that the Supreme Court decided
16 *Wiggins against Smith* at some point after you had been
17 appointed to represent Mr. Murphy?

18 A. That's right.

19 Q. Had you conducted a mitigation investigation in any of the
20 previous cases where you represented capital defendants even
21 though *Wiggins* had obviously not been yet decided?

22 A. I had in both of those cases. I had -- in Mr. Robertson's
23 case I was in contact with his family. We had -- we had him
24 looked at both medically and psychologically. I honestly don't
25 remember everything that we did, but we did what we could --

1 you know, what we -- I guess you'd call the state of the legal
2 art at the time.

3 On Mr. Lizcano, I had him -- I had difficulty with
4 his family. They wouldn't participate for reasons that aren't
5 relevant here. But we finally did get interviews with the
6 family. One of the -- one of the family members was a
7 probation officer in the juvenile department that was familiar
8 with psychological issues. We used her somewhat to explain
9 some of the family dynamics.

10 I had him looked like by an expert in adolescent
11 behavior disorders. That wasn't helpful. And we just found
12 out everything we could about him, but we did not have an
13 organized mitigation investigation.

14 Q. In the Murphy case, who was it that designed the
15 mitigation strategy?

16 A. Dr. Vigen. Well, let me just put it -- I don't know. Let
17 me just clarify that. He discussed with me what he had found
18 and what he could testify about, what he thought might be
19 important to the jury. And he gave me those conclusions, and
20 we discussed them and practiced testifying about them. It's
21 contained in the file that I brought today.

22 Q. Do you remember how long before Mr. Murphy's trial
23 commenced you hired Dr. Vigen?

24 A. No, I don't.

25 Q. If the billing records that you have in front of you --

1 I'm sorry, Ms. Busbee. If Dr. Vigen's billing records
2 reflected that he was hired in September of 2003, would you
3 have any reason to believe that those records are incorrect?

4 A. I don't. I don't. I don't. But it seems to me that we
5 had been working with him for longer than that. But I don't
6 have Dr. Vigen's records, do I?

7 Q. No.

8 A. Okay. I don't see them in here.

9 (Pause)

10 MR. DOW: Judge, may I approach the witness?

11 THE COURT: You may.

12 (Pause)

13 BY MR. DOW:

14 Q. If you turn first, Ms. Busbee, to -- the pages are not
15 numbered, but if you just flip to the fifth page, which is a
16 page that looks like a bill that was generated by Dr. Vigen's
17 office. It's hard to read, but if you look at the first date
18 in the top of that column, August the something, 2003?

19 A. Uh-huh.

20 Q. If Dr. Vigen believes that that was when he was originally
21 contacted by you or somebody on your behalf, would you have any
22 reason to think that he's mistaken about that?

23 A. Well, I mean, it says it's a phone consult. I don't -- I
24 don't know. I really don't know. That could be -- it could
25 be.

1 Q. If you look at page 3 of those records that I handed you,
2 Ms. Busbee --

3 A. Uh-huh.

4 Q. -- where Dr. Vigen indicates that the date of his
5 appointment was September of 2003, do you have a reason to
6 believe that that's an error?

7 A. You said page 3?

8 Q. The third page of the -- it says, "Defense Claim for
9 Expenses" -- "Defense Claim for Services or Expenses" at the
10 top of the page.

11 A. Oh, you mean page 3 of his billing?

12 Q. Yes.

13 A. No, I mean, it's -- whatever it says is what it says. I
14 don't --

15 Q. You don't have any personal reason to believe that those
16 are mistakes?

17 A. No, I don't.

18 Q. Okay. When Dr. Vigen was conducting his investigation, do
19 you know who he counted on to educate him about people,
20 subjects, issues that he might investigate?

21 A. I'm sure he counted on me. I don't know how -- he also
22 I'm sure talked to Mr. Sanchez, but I don't know if -- because
23 we both had, you know, copies of all the records. So, I don't
24 know if he consulted with Mr. Sanchez. You'll have to ask him,
25 of course.

1 Q. And when Dr. Vigen consulted with you about those things,
2 do you know whether you had, at that time, formed a mitigation
3 strategy?

4 A. Yeah. You know, he had a very, very rough upbringing, and
5 that's always something that's sympathetic. So, if you're
6 asking me in retrospect, I'm going to tell you more likely than
7 not it had to do with the horrible way that he was raised to
8 get sympathy for his behavior as an adult.

9 Q. What kind of doctor is Dr. Vigen?

10 A. He's a forensic psychologist. He might be a neuro-
11 psychologist.

12 Q. I believe you said that the Murphy case was the first case
13 where you had worked with him? Did I understand you correctly
14 to say that?

15 A. That's right. I did not know him prior to receiving the
16 recommendation from Dr. Cunningham.

17 Q. Have you worked with him since?

18 A. I have.

19 Q. Have you worked with him in other capital murder cases?

20 A. Let's see. Not as a mitigation expert. The next case
21 after that that I tried, I think, was the Lizcano case. And
22 we -- we needed Spanish-speaking doctors for the testing, but
23 that judge would give me a psychiatrist every time I asked him
24 for one. And at that point, Dr. Vigen had become interested in
25 a study on future dangerousness that he participated in with

1 S.O. Woods, former classification head of the Texas Department
2 of Corrections. And so we consulted him more as an expert on
3 that study of future dangerousness than we did as mitigation.

4 So -- and I used him to do a danger assessment on a
5 client here in Federal court who threatened a federal judge.

6 I'm trying to think of what other things I used him
7 on. I used him on a capital murder case that did not -- was
8 not a death penalty case. It had to do with a psychological
9 interview of a mother who killed her children.

10 I think that's all I have ever used him on. That's
11 what comes to mind.

12 MR. DOW: May I have just a moment, Judge?

13 THE COURT: Yes, of course.

14 (Pause)

15 BY MR. DOW:

16 Q. To your knowledge, Ms. Busbee, had Dr. Vigen received any
17 specialized training or education as a mitigation investigator
18 at the time that you hired him?

19 A. I -- no, I don't think that he had. I don't think anybody
20 had.

21 Q. Who else besides Dr. Vigen conducted any part of an
22 investigation that was relevant to your construction of a
23 mitigation narrative?

24 A. Bill Van Sickle was an investigator who went around
25 finding family members and had preliminary interviews with

1 those people. Dr. Jay Crowder did medical imaging tests. He
2 may have done more. I don't know. Dr. Lacritz, who is a
3 psychologist -- I think she's associated with the medical
4 school -- did some testing. And Dr. Vigen. So, those persons
5 that I can recall at this time.

6 Q. Was the --

7 A. I'm sorry. One other person. A psychiatrist, Dr. Lisa
8 Clayton.

9 Q. To the best of your knowledge, was the manner in which
10 these other investigators conducted their investigations
11 similar to the manner in which Dr. Vigen did? And by that, I
12 mean that you were having ongoing conversations or
13 consultations with them while they were conducting their
14 investigations?

15 A. No.

16 Q. What was different?

17 A. Well, Dr. Crowder is sort of the thing we always did,
18 because you want to look for organic brain damage in a -- or
19 some explanation for behavior that may not be the fault of
20 the -- or blamed upon the defendant.

21 Dr. Crowder recommended Dr. Lacritz, the best that I
22 can recall, and she just did whatever test she did -- I have
23 her report -- and made a diagnosis of any psychiatric problems
24 that he may have that she diagnosed him with.

25 I don't have Dr. Clayton's report, but she is

1 somebody that we use in Dallas often to -- just because she's
2 one of the people that we go to for "is my client competent"
3 and that type of thing.

4 So, I don't remember and don't currently have her
5 report, but I have referenced somehow that she talked to him
6 and made a report. But she was not ongoing. This was just us
7 doing as much as we could to find out what an expert could say
8 about him prior to the time that we had mitigation assistance.

9 Q. Did you conduct any part of the mitigation investigation
10 yourself?

11 A. Yes.

12 Q. What did you yourself do?

13 A. I traveled out to visit with Linda -- I'll have to call
14 her Aunt Linda because I can't think of her last name -- and
15 another family member, a younger female, who were residing near
16 Palm Springs. And I talked with them at length a couple of
17 times. They were typical family members. We got them -- you
18 know, everything was rosy in their life -- this, that, and the
19 other.

20 Dr. Vigen conducted much more intensive interviews
21 with them and was able to obtain a whole lot more information
22 than I could when I went out there. But I think -- I'm sure I
23 went out there to see them before Dr. Vigen was involved.

24 Q. Would Aunt Linda be Linda Goodman?

25 A. Yes, that's her name.

1 Q. Do you remember which members of Mr. Murphy's family you
2 called as witnesses at his trial?

3 A. We called Linda. We called the sister. We called the
4 father. His mother, of course, was deceased. The brother was
5 not going to be a good witness. And he was present in the
6 courtroom, but we did not call him. That's just what comes to
7 mind.

8 Q. Can you tell the Court, Ms. Busbee, what has to happen in
9 a capital murder trial in Texas in order for the defendant to
10 be sentenced to life rather than death?

11 A. The jury has to determine that the person is not a future
12 danger. The person -- the jury has to determine that there is
13 no mitigating evidence that would convince them that despite
14 the fact that they are a future danger -- I'm trying to think.
15 At that time it wasn't a deliberateness question back then.
16 And I've asked this, of course, a thousand times. Let's see.
17 He was a party. There was a parties' question in his case,
18 which I can't remember how that goes. And -- now I'm blanking
19 out on what the other question is.

20 But in any event, they have to answer the question so
21 that they -- it was not intentional. I'm blanking out on the
22 word. That they're not a future danger and that there is
23 nothing that has been presented that is mitigating enough that
24 the person should receive life instead of death.

25 Q. Thank you.

1 So, would you agree with me, Ms. Busbee, that if the
2 jury concludes that the Defendant would not be a future danger,
3 that he will receive a life sentence rather than a death
4 sentence?

5 A. If they determine -- if one person determines that
6 that's -- that's their verdict, then, yes.

7 Q. If one person on the jury believes that the defendant will
8 not be a future danger, that person will be sentenced to life
9 rather than death?

10 A. Yes.

11 Q. And if one person on the jury believes that there are
12 sufficient mitigating facts to warrant a life sentence rather
13 than a death sentence, will that person be sentenced to life
14 rather than death?

15 A. Yes.

16 Q. So, when you were constructing your mitigation narrative,
17 focusing for a moment on the future dangerousness question,
18 what was your strategy?

19 A. Well, I had a much better situation than the other
20 defendants, because my client had not participated in any of
21 the beating of the guards or the restraining of the guards.
22 None of the people who had been attacked when they escaped
23 could even identify Murphy. So, that was good.

24 Mr. Murphy was -- had a -- spotless compared to
25 everybody else, a spotless disciplinary record. His

1 disciplinary record, if I recall, has to do with tobacco
2 products and unauthorized fan, something like that.

3 So, furthermore, he wasn't present at the time; that
4 he was driving the get-away car and it was blocks away,
5 allegedly, at the time that this murder happened.

6 And we used -- George Rivas came back and testified
7 in his behalf to say that he was sort of a dufus. I think
8 that's in the record that they -- he set forth how he selected
9 the people who would participate in the scheme. And actually
10 he had a criteria for future dangerousness as well. He didn't
11 want anybody who was going to cause problems and get them
12 recaptured.

13 So, I just tried to show the jury that he was a
14 follower, that he was kind of an inept bumbler as far as the
15 rest of these, you know, bad criminals were concerned and that
16 he was included in their group, you know, to fill a number
17 requirement, the best I can recall.

18 Q. Did you call any witnesses at the punishment phase of the
19 trial whose testimony you intended to be specifically useful
20 with respect to the future dangerousness question?

21 A. I don't think that we had that study by Dr. Sorenson. I
22 think that came after this. But I called Dr. Vigen for that,
23 and I called S.O. Woods for that.

24 Q. Had you interviewed both Dr. Vigen and Mr. Woods prior to
25 calling them as witnesses with respect to the future

1 dangerousness question?

2 A. Yes, I did.

3 Q. Did you ask them when you were talking to them, prior to
4 calling them, specifically what their answer would be to the
5 future dangerousness question?

6 A. Yes.

7 Q. Do you recall asking Mr. Woods whether he believed
8 Mr. Murphy would be a future danger while you were examining
9 him as a witness?

10 A. I don't remember specifically, but the gist of what I
11 recall is, is that he was a person who under the classification
12 system that he designed would not be considered a danger in
13 prison, because that's where he would be if he would be given a
14 life sentence. So, that was the -- that was my goal in calling
15 him for that issue.

16 Q. Do you recall what Mr. Woods' testimony actually was in
17 Mr. Murphy's trial?

18 A. Well, I remember -- I remember the bad moment when on
19 cross-examination he admitted that -- or said -- made a
20 statement that he was a very dangerous man, but up until that
21 time he had said what I had anticipated that he would say,
22 which was that within the prison system Mr. Murphy was not a
23 dangerous person.

24 Q. So that during your interviews with him, prior to calling
25 him as a witness, did he tell you privately something that he

1 then contradicted as a witness?

2 A. Yes.

3 MR. DOW: Can I have just a brief moment, Judge?

4 THE COURT: Of course.

5 THE WITNESS: Can I get some more water?

6 THE COURT: Yes, yes.

7 (Pause)

8 MR. DOW: For the record, Judge, Mr. Greenwell and I
9 were discussing before the hearing commenced how we would refer
10 to the reports that are already contained as part of the habeas
11 application or the Government's reply, and both of our
12 experience is that it is less confusing not to admit them
13 because they are already attached as exhibits to a habeas
14 application. And so if we admit them as exhibits during this
15 proceeding, they are going to have two different numbers or
16 letters.

17 THE COURT: I agree with that. I think it would be
18 better -- I think first identify them. Identifying them with
19 the header from ECF is helpful for this. Identify where
20 precisely they are in the record. I think -- in the existing
21 docket, I think. I agree with you, it makes more sense.

22 MR. DOW: Thank you, Judge. So, for the same of the
23 record I will indicate that what I have given the witness is a
24 copy of a report that was prepared by Dr. John Fabian, who
25 was -- who is a psychologist who has been hired by Mr. Murphy's

1 current counsel.

2 (Pause)

3 BY MR. DOW:

4 Q. I would like you to turn, if you wouldn't mind,
5 Ms. Busbee, to page 17 of the report that I've handed you, the
6 very bottom of page 17 and the very top of page 18.

7 THE COURT: I guess -- let me just say for the
8 record, this is -- what we're all looking at is Docket Entry
9 84-1, so --

10 MR. DOW: Yes.

11 THE COURT: Yeah.

12 MR. DOW: Thank you, Judge.

13 BY MR. DOW:

14 Q. At the bottom of page 17 and the top of page 18,
15 Ms. Busbee, Dr. Fabian identifies sources of trauma that
16 Mr. Murphy suffered?

17 A. Yes.

18 Q. Can you look at that list and tell me whether you were
19 aware from your investigation of the specific items on that
20 list?

21 A. Yeah. All of this is contained in Dr. Vigen's timeline
22 that he provided to the defense.

23 Q. All eight of those items are in Dr. Vigen's timeline?

24 A. I don't remember seeing Dr. -- this Mr. Don Ballinger, but
25 I remember knowing that. So, yes.

1 Q. When -- Dr. Crowder, is he the -- can you remind me who
2 the neuropsychologist was?

3 A. He's a physician. Dr. Crowder is the one who did the
4 MRI's or CAT scans or whatever we did back then.

5 Q. Which of the experts that you identified for me earlier
6 would have been the expert on your team who would have made a
7 psychological diagnosis of Mr. Murphy based on, among other
8 factors, these eight factors?

9 A. Dr. Vigen, Dr. Clayton, Dr. Lacritz.

10 There's also a psychological evaluation that -- I
11 think we obtained this through S.O. Woods that the State didn't
12 have this -- that was done at the time that he was considered
13 for the sex offender treatment program at TDC where they looked
14 at his past. So, I have relied on all of those reports.

15 Q. Did you have conversations with Dr. Vigen or Dr. Clayton
16 or Dr. Lacritz prior to Mr. Murphy's trial where you asked them
17 specifically how these trauma factors would manifest or exhibit
18 themselves in Mr. Murphy?

19 A. I don't remember having -- I don't remember conversations
20 with any doctor other than Dr. Vigen off the top of my head. I
21 don't remember those conversations, if I had any. I'm sure we
22 had many conversations, Dr. Vigen and I, concerning what this
23 meant in terms of where he was, sitting there with a potential
24 death sentence and how some of these factors may explain it and
25 mitigate it.

1 Q. Are you familiar with the concept of posttraumatic stress
2 disorder or PTSD?

3 A. As much as any layperson. Not -- I don't have any special
4 knowledge about it.

5 Q. Did you Dr. Vigen discuss specifically whether in his view
6 Mr. Murphy suffers from PTSD?

7 A. I don't remember that conversation. I don't remember
8 having a conversation about that. I'm not saying we didn't,
9 but I don't recall it if we did.

10 Q. If Dr. Vigen had told you that he believed that Mr. Murphy
11 suffers from PTSD, would that have been a factor that you would
12 have been able to use in your mitigation narrative?

13 A. Yeah, I think that would have been very helpful.

14 Q. Earlier we were talking about your objective with respect
15 to the future dangerousness question. I would like to ask you
16 now a bit about the other question that we were discussing, the
17 mitigation question.

18 I understood you to say that if a single juror
19 believed that the mitigating facts warranted it, the defendant
20 would be sentenced to life rather than death?

21 A. Well, to the extent that it requires a unanimous verdict
22 on each of the questions.

23 Q. With respect to that mitigation question, what was your
24 mitigation strategy at Mr. Murphy's trial?

25 A. To characterize him as a victim of his upbringing and to

1 show to the jury that he was not going to pose a further
2 danger.

3 Q. Who were the witnesses that you called at the punishment
4 phase whose testimony you believed at the time would be
5 relevant to the jury's consideration of the mitigation
6 question?

7 A. Well, anybody that could talk about the horrendous
8 childhood that he had, and those would be family members. And
9 then -- of course, the record will speak for itself. And I'm
10 sorry that I have not read that punishment thing. I intended
11 to do that yesterday. But whoever -- certainly Dr. Vigen and
12 certainly Mr. Woods, who had just retired from TDC not too long
13 before this trial and was a nationally respected expert on
14 classifications and safety in prisons. And so we thought that
15 would be a really great thing to hang our hat on, that he did
16 not feel he would be a danger in the prison.

17 Q. I want to focus specifically, though, for a moment,
18 Ms. Busbee, if I can, on the mitigation question, not the
19 future dangerousness question.

20 A. Oh, sorry about that.

21 Q. That's all right.

22 with respect to the mitigation question, would there
23 have been any reason for you not to have included the fact that
24 Mr. Murphy suffers from PTSD as part of that narrative?

25 A. Well, I did not have that diagnosis. It was never

1 suggested to me by anybody that looked at him.

2 Now, I know that the criteria for PTSD has changed
3 from the DSM-IV to the DSM-V, so I don't -- you would have to
4 ask them why they did not diagnose him with that. That may be
5 one of the issues. I noticed that this was -- that this
6 diagnosis was made under the new criteria, so I don't -- I am a
7 layperson when it comes to this. I do not know why they did
8 not diagnose him with PTSD and this gentleman did.

9 Q. And just to be clear, Ms. Busbee, I'm not asking you to
10 speculate about why Dr. Vigen reached any diagnosis or didn't
11 reach any diagnosis. I'm simply asking whether if Mr. Murphy
12 had been diagnosed prior to the time you went to trial as
13 suffering from PTSD whether you would have used that as part of
14 your mitigation narrative?

15 A. I would have.

16 Q. How would you have used that?

17 A. I would have -- well, it would have dovetailed perfectly
18 within the theory of the mitigation, which is he was a product
19 of a terrible upbringing. It would have been very good
20 evidence in mitigation.

21 Q. Do you recall discussing any specific psychological or
22 psychiatric diagnosis with Dr. Vigen?

23 A. Yes.

24 Q. Which specific psychological or psychiatric diagnosis?

25 A. If you will let me refer to my file that I brought with

1 me. I reviewed some of that last night. It's back here.

2 THE COURT: Any objection to --

3 MR. GREENWELL: No objection, Your Honor.

4 THE COURT: All right.

5 MR. DOW: Certainly not, Judge.

6 THE COURT: Okay. All right.

7 (Pause)

8 THE COURT: Okay. Ms. Busbee, just for the record,
9 what records have you retrieved that you're now reviewing?

10 THE WITNESS: These are records that -- I don't know
11 that it's necessarily the entire file, but it's the majority of
12 my trial file that was never asked for by anybody.

13 THE COURT: Okay.

14 THE WITNESS: And I went through it last night, and I
15 see that there are some opinions that Dr. Vigen has faxed to
16 me, and I have some of my own handwritten notes about -- it
17 looks like this -- I don't know which came first, but it looks
18 like we did it once and then we came back again and did some
19 more elaboration.

20 I'll have to -- ask me the question again. I'm going
21 to have read my own handwriting here.

22 BY MR. DOW:

23 Q. You've asked me the hardest question anybody could ask me.

24 Ms. Busbee, I believe that what I asked you was
25 whether you discussed with Dr. Vigen any specific psychological

1 or psychiatric diagnosis that he had made of Mr. Murphy and, if
2 so, what it was?

3 A. Well, what it is here is -- it looks like exactly the same
4 five opinions that Dr. Vigen was going to give me. One was
5 faxed to me, and I have got a few notes on it. And this looks
6 like what I worked off of, because it's got a lot of notes on
7 it.

8 we discussed that he had a diagnosis of sexual order
9 [sic] nonspecific on Axis I and narcissistic borderline and
10 antisocial traits on Axis II; that he wanted me to ask him
11 about the course of antisocial personality disorder, that that
12 declines over time; to read something concerning persistent
13 sexual orientation succession of -- cover feelings of
14 inadequacy, I think. Narcissism, persistent pattern of
15 grandiosity. Antisocial tendencies, somewhat borderline,
16 equals abuse -- and I put a star by "antisocial equals" --
17 deceitful, impulsive, violates law.

18 And I have scratched through what he had typed here,
19 scratching through "Patrick Murphy is a sex offender." So,
20 apparently we discussed that he wouldn't say that, which he
21 subsequently did.

22 That the second opinion on my final working copy was
23 that Patrick Murphy has a sexual disorder and his personality
24 traits as a result of a long and severe history of family
25 dysfunction. Repeated sexual violation makes a person sneaky,

1 that he may -- a controlled rapist. Sexual disorder usually
2 have family component. And plus these extensive relocations
3 equal many different kinds of parents.

4 Newly numbered opinion Number 3. Given his
5 personality traits, Patrick Murphy is more of a follower than a
6 leader in the escape and ultimate murder of Aubrey Hawkins. He
7 based that on interviews with Defendant and observations of
8 father, Linda, and sister, George Rivas, written material --
9 something about being an inadequate man or men. I don't know
10 what I meant by that.

11 Number 4. Given the escape and conviction and given
12 the absence of violence in his 16-year-prison history, it was
13 his belief that the TDC will assign Patrick Murphy to
14 administrative segregation and as a result Patrick Murphy has a
15 very low risk of future violence.

16 And that he has potential for rehabilitation and
17 possible personal and spiritual conversion as he moves into the
18 latter part of the second half of his life; that the best thing
19 for him would be to serve time in TDC where they can control
20 his behavior; that he has -- not have skills here. I don't
21 know what that meant.

22 That he has -- he has begun writing people and he's
23 getting better in his interpersonal relations with people. And
24 something about "abuse trusted adults, no." And I don't know
25 what I mean by toxic waste dump, but it's probably something

1 Dr. Vigen had to say about the entire upbringing of Mr. Murphy,
2 because it was pretty bad, as I recall.

3 So, I don't have independent recollection of this,
4 but this is just -- this makes me know that this was when we
5 were practicing his testimony, because I did now see I
6 scratched through this business that he ultimately spit out
7 when he was being cross-examined.

8 Q. Is there anything in either Dr. Vigen's report or the
9 notes of yours that you were just looking over that makes you
10 think that Dr. Vigen diagnosed Mr. Murphy with PTSD?

11 A. I'm relatively certain he did not.

12 Q. I believe I already asked you this, but because I can't
13 remember for sure, if -- I'll ask you again. If he had
14 diagnosed Mr. Murphy with PTSD, would you have used that
15 diagnosis in your mitigation narrative?

16 A. I absolutely would have.

17 Q. Why?

18 A. Because I think it would have been an effective diagnosis.
19 It would have tied his current behavior to -- or his recent
20 behavior to his dreadful childhood, and it would have been
21 sympathetic.

22 Q. Ms. Busbee, if this Court were to conclude that Dr. Vigen
23 was not, in fact, qualified to conduct a mitigation
24 investigation at the time of Mr. Murphy's trial, on whom would
25 that failure fall?

1 A. Well, to me it would fall on the fact that this was a
2 brand-new field and we were flailing around, trying to figure
3 out what a mitigation expert was and did.

4 MR. DOW: May I have one moment, Judge?

5 THE COURT: You may.

6 (Pause)

7 MR. DOW: I pass the witness, Judge.

8 THE COURT: All right. Cross-examination?

9 MR. GREENWELL: Your Honor, I know Mr. Dow has been
10 sitting the entire time. Is it your preference that we stand
11 or --

12 THE COURT: You know, actually, it's fine. Sitting
13 is fine.

14 MR. GREENWELL: Okay. I just wanted to --

15 THE COURT: No, I appreciate that. And it's
16 typically different than between State court and Federal court,
17 but given the paperwork and everything y'all are working
18 with --

19 MR. GREENWELL: Got you.

20 MR. DOW: Thank you, Judge. And I apologize.

21 THE COURT: No, that's quite all right. If it
22 bothered me, I would have said something about it, so --

23 CROSS-EXAMINATION

24 BY MR. GREENWELL:

25 Q. Well, Ms. Busbee, my name is Jeremy Greenwell. I'm

1 counsel for Respondent Stephens in this proceeding.

2 I wanted to go ahead and get something preliminary
3 out of the way. You and I have met previously; is that
4 correct?

5 A. Did we?

6 Q. Well, earlier?

7 A. Yeah. I intended to come here at 8:30 because I was going
8 to talk to you beforehand, but I -- well, actually, I was going
9 to talk to you yesterday, but I couldn't get a chance to do it
10 yesterday, so I tried to get up here at 8:30. And I called you
11 or told you last night that I had found this file, but I hadn't
12 gone through it at that time.

13 Q. So, we have spoken on the phone before?

14 A. Sure, sure.

15 Q. Okay. In any of these conversations that we've had, has
16 either I or anybody from our office instructed you how to
17 testify at this hearing?

18 A. Not to testify or how to testify?

19 Q. How to testify?

20 A. No.

21 Q. In one way or another?

22 A. No.

23 Q. Okay. So, your testimony is based purely on your
24 recollection as you remember it?

25 A. Yes.

1 Q. Okay. I just wanted to get that out of the way.

2 A lot of what I want to ask you is probably redundant
3 to what Mr. Dow has already asked you. We probably will do it
4 in a different order, so forgive me if it's already been asked
5 and answered.

6 Let's first start out with your background. How long
7 have you been practicing law, did you testify?

8 A. Since 1979.

9 Q. 1979. And you've been a defense attorney this entire
10 time?

11 A. No. I started out at the Travis County District
12 Attorney's office, which, as you may not know, is a -- has only
13 felony jurisdiction. So, I stayed there for -- well, I
14 actually worked there when I was in law school, and then I
15 stayed there -- I was the chief of the 147th District Court for
16 about a year, and then I moved back to Dallas, my hometown, and
17 began -- which was the very end of 1981. And I've been
18 practicing law in private practice since then.

19 Q. Okay. So, in your capacity as either defense attorney or
20 prosecutor, how many felony murder trials have you been
21 involved in?

22 A. Oh, gosh. Probably -- I never have counted up my trials,
23 but I wouldn't be surprised that it would be around 100, maybe
24 75.

25 Q. How many of those have been capital murder trials?

1 A. That went to trial? Six.

2 Q. Six capital murder trials?

3 A. Uh-huh.

4 Q. Okay. How many of them were you lead counsel in?

5 A. Three, I think.

6 Q. Okay. At the time of Murphy's trial, I think you may have
7 said this before, but how many had you done before you were
8 appointed as Murphy's counsel?

9 A. Two.

10 Q. Two before then.

11 Okay. And you were appointed as lead counsel in this
12 case?

13 A. Yes.

14 Q. And your co-counsel was Juan Sanchez; is that correct?

15 A. Juan Sanchez, yes, sir.

16 Q. Okay. How did the two of you decide how to divide up
17 duties?

18 A. Well, being something of an aggressive control freak, I
19 did -- I did most of the case and had him do the -- there was
20 extensive testimony concerning weapons and ballistics and
21 matters having to do with the shooting of Mr. Hawkins.
22 Essentially -- and, of course, we had the benefit of reading
23 all the prior testimony.

24 But our client actually had no participation in the
25 actual shooting, because he wasn't there. So, the fine points

1 of, you know, whether that was going to help or hurt Mr. Murphy
2 did not exist. And so I asked Juan to take over the
3 cross-examination of anything having to do with the ballistics.

4 And I don't remember if he did anything else, but
5 that was -- that was what he did. This was his first death
6 penalty case. And he participated in all meetings that I can
7 recall except maybe some of the travel meetings with Dr. Vigen.
8 And that was a learning experience for everybody, because it
9 was new.

10 Q. But as lead counsel, any decisions that were made
11 regarding either guilt/innocence phase testimony or punishment
12 phase testimony ultimately went through you; is that correct?

13 A. That's true.

14 Q. Okay. Were either you or Mr. Sanchez assigned mainly for
15 the mitigation investigation or the punishment phase, or did
16 you do it together?

17 A. We did it together.

18 Q. Let me talk a little bit about how you normally prepare
19 for trial ordinarily, in a capital murder trial especially. Do
20 you have a routine that you normally follow when you are first
21 appointed?

22 A. Oh, yeah. I go -- I have a warning that I fax to the
23 Sheriff's Department immediately. I mean, that goes before I
24 probably even find out about it. My secretary sends it over
25 there and says something to the effect of "You may not speak to

1 my client. You may not allow the press in to see my client.
2 My client invokes his Fifth and Sixth Amendment rights," et
3 cetera, et cetera, just something that we fax over.

4 Then we -- I see him as soon as physically possible
5 and give him a number of -- or her -- a number of warnings
6 concerning talking to people in the jail, talking on the
7 telephone, talking to the press, just -- just kind of a
8 prophylactic behavior to keep it from getting worse, because
9 sometimes that happens. In fact, it happens a lot. They
10 get -- I've met the press leaving the jail as I come in to meet
11 my client, and it's never good.

12 Q. Okay. Do you have a certain timeline as to when you file
13 certain motions, motions in limine, motions for funding,
14 anything of that sort?

15 A. No. In fact, as I mentioned previously, all the motions I
16 let the appellate attorney file. Sometimes I have suggestions
17 on that. Often I have suggestions on that. I say, "Draft me a
18 motion for this, that, or the other." And --

19 Q. Okay.

20 A. I compartmentalize my defense that way.

21 First of all, sometimes you don't know whether or not
22 the State is going to seek death. You know, you assume it at
23 the very beginning, but Dallas has been pretty good about
24 letting us know, yes or no, on whether they're going to seek
25 death. And so, you know, if they're not seeking death, it goes

1 one way. If they are seeking death, of course, it goes
2 another.

3 Q. How about specifically with regard to your preparation for
4 the punishment phase of the trial, assuming the D.A.'s office
5 has informed you that they are going to seek death?

6 A. Well, pre-mitigation expert, it was "Let's get him looked
7 at by Dr. Crowder over at UT Southwestern. Let's have him
8 looked at by this person. Let's" -- you know, we use an
9 investigator, which would be, you know, often, frequently,
10 former law enforcement or something like that that are now
11 private investigators to speak with everybody that we can to
12 find out everything we can about our client. We would always
13 have them evaluated psychologically.

14 Post then, we get a mitigation expert. Now, I think
15 the last two or three I have been second chair.

16 Q. Okay.

17 A. And, in fact, the last one I was involved in, Mr. Sanchez
18 was first chair and he lost his second chair, so I didn't get
19 involved in the case until very late, and all these decisions
20 had previously been made.

21 So, it's been a while since I have been called into
22 action when they were seeking death, so I can't really give --
23 tell you that I have a game plan that I invoke the minute I get
24 a death-penalty case.

25 Q. That's no problem.

1 But you mentioned you have the defendant evaluated by
2 experts. What are you looking for when you have him
3 evaluated --

4 A. Well --

5 Q. -- in general?

6 A. -- first you would like to find some organic brain damage
7 so that you can say it's not his fault; he got a whack on the
8 head or he was born with some kind of a defect that makes him
9 abnormal.

10 Then you want to find out whether there's, you know,
11 a psychological diagnosis that might explain some behavior that
12 might be mitigating. And that's what you do.

13 Q. Okay. When you're looking for something, do you also
14 examine, say, medical records or school records --

15 A. Oh, sure.

16 Q. -- or TDCJ records or whatever you can get your hands on?

17 A. Oh, yeah. We always get all of those records.

18 Q. Okay. You mentioned hiring an investigator. Is that
19 something you always do, is hire an investigator?

20 A. Absolutely.

21 Q. Okay. Is that one of the first things you do?

22 A. Yes.

23 Q. Okay. We talked a bit about what is now being referred to
24 as a mitigation expert. In the capital murder cases that
25 you've been involved in, have you ever hired a mitigation

1 expert or what is now being termed a mitigation expert?

2 A. Now I have. Well, let's see. Let me think about it. I
3 was appointed on Lizcano because after that I was second chair.
4 Yes, I hired a mitigation expert in Mr. Lizcano's case early
5 on.

6 Q. Were such experts around at the time of this trial,
7 Mr. Murphy's trial, in 2003?

8 A. I don't even think that we even still -- that we had a --
9 we know what a mitigation expert is, like, for certainty.

10 In the second occasion I was called upon to hire a
11 mitigation expert, we ended up -- we needed a Spanish speaker.
12 That was almost impossible. And we ended up getting -- using
13 an investigative journalist, who was -- did an excellent job of
14 investigating the defendant's background. I've never seen
15 anything quite like it. She coordinated with other
16 specialists, of course.

17 But I can't tell you to this day that we have -- I
18 mean, that they -- I know they go to meetings and this, that,
19 and the other, but there is some ideal mitigation expert out
20 there. Probably, as I'm saying, it had a lot to do with the
21 kind of case it was.

22 Q. And this mostly came about, from your recollection, as a
23 result of the *Wiggins* case in 2003; is that correct?

24 A. When I was allowed to hire a mitigation expert?

25 Q. Or the term "mitigation expert" --

1 A. Right.

2 Q. -- as it's now known?

3 A. Yeah. We didn't really know what that meant. But my
4 feeling at the time was it was somebody who was going to
5 investigate everything possible in the defendant's background
6 to present it in a sympathetic fashion, if there was such a
7 way, to the jury.

8 Q. In 2003, you mentioned funding. Would there have been
9 funding available to hire such an expert if they actually
10 existed?

11 A. In 2003, yes. That was -- because that decision had been
12 made. In fact, if I'm not mistaken, when *Wiggins* came down,
13 Judge -- the Judge called me and said, "You're going to have to
14 get a mitigation expert," and I started looking around.

15 Q. Okay. Is that when you hired Dr. Vigen?

16 A. Probably not. It took me a while to find somebody.

17 You know, as I say, I got this slew of things in the
18 mail, trying to get me to hire people. And they all seemed
19 suspect to me. And I actually read -- I can't tell you what
20 order. Obviously, we had to have a transcript of the prior
21 trial before we could commence with the next trial.

22 So, I read a couple of -- I read a couple of records
23 before I decided how to use a mitigation expert, because I
24 remember a Dr. Kelly Good or something or the other. She's
25 horrible. And somebody else that I read was horrible. And I

1 was trying to find out who we were going to use and how we were
2 going to use them, because it was just -- it was a developing
3 field at that time.

4 Q. Okay. Let me back up for a second. You hired a fact
5 investigator to help you in this case; is that correct?

6 A. Bill Van Sickle, yes, sir.

7 Q. Okay. His name is --

8 A. Van Sickle.

9 Q. Van Sickle. Do you remember when he was hired?

10 A. He was -- I brought him on immediately.

11 Q. Okay. And did he help you in your punishment phase
12 investigation?

13 A. Yes.

14 Q. Okay. And you then hired Dr. Vigen, correct?

15 A. Yes.

16 Q. Would you have considered him, for lack of a better term,
17 your mitigation expert?

18 A. I did.

19 Q. Okay.

20 A. That was -- that was -- that was his title.

21 Q. Okay. That was his actual title?

22 A. To my mind. I mean, that wasn't his title on his
23 letterhead, but that was the purpose he was hired.

24 Q. Okay. And do you believe he was qualified to serve that
25 purpose?

1 A. I did then and I still do.

2 Q. Okay. In his petition Mr. Murphy has complained that your
3 investigation into the mitigation phase only started around two
4 months prior to the punishment phase. First of all, do you
5 believe that's true?

6 A. Oh, no, no. That's not true at all. I had been out a
7 year or two before to talk to his family. I had talked to his
8 brother. I talked to quite a few people prior to the time that
9 he -- that Dr. Vigen, I guess -- if that's true when he was
10 hired. I had been out and talked to lots of folks. I reviewed
11 a lot of records.

12 Q. So, you yourself interviewed numerous witnesses?

13 A. I did.

14 Q. Okay. And your investigators, both Vigen and -- I'm
15 sorry, I can't remember the name.

16 A. Van Sickle.

17 Q. -- Van Sickle also interviewed numerous witnesses?

18 A. Well, once Dr. Vigen was onboard, he wanted to talk to
19 everybody again with his -- you know, his special knowledge,
20 and so that's what we did. He went back and talked to
21 everybody.

22 And, I mean, I don't remember if he -- he may have
23 been able to obtain additional records from TDC. There was a
24 secret back then and may still be to getting certain medical
25 records that S.O. Woods was hip to, so he got us -- probably

1 got us some additional records.

2 But once Dr. Vigen was onboard, Mr. van Sickel's role
3 was to assist him, if he did, in finding people and arranging
4 meets and whatnot.

5 Q. So you had -- you essentially had a team of people working
6 on this case?

7 A. Yes.

8 Q. At least four, possibly more?

9 A. Three lawyers, Dr. Vigen, Mr. van Sickel, and Mr. Woods.
10 So, that would be six if you want to call them a team. I think
11 really S.O. Woods is more like a witness. But he did -- did
12 help us in a field where we wouldn't have known -- wouldn't
13 have been able to put on that evidence otherwise.

14 Q. Okay. So, I assume you had fairly intimate contact with
15 all of the people working as your investigative team --

16 A. Yes.

17 Q. -- into what they were looking into?

18 A. Uh-huh.

19 Q. Do you recall more or less how many witnesses you had
20 contacted about potentially testifying in Murphy's case?

21 A. Before Dr. Vigen?

22 Q. Before trial?

23 A. Before trial? I couldn't say. But let's say four or five
24 family members. He didn't have any friends that -- other than
25 his brother that we were able to contact. Old girlfriends. I

1 think we tried to -- I think we got in touch with his ex-wife.

2 Not helpful. So --

3 Q. So, ex-wife, father, siblings?

4 A. Living siblings, aunt.

5 Q. Living siblings, aunt?

6 A. I mean, the people that -- obviously, he had been in
7 prison for 17 years prior to this, so he really hadn't had any
8 contact with anybody. He didn't have a social network outside.
9 And so we talked to the people that we could who were
10 essentially his family members.

11 Q. And as you testified before, in consulting with these
12 various witnesses, did you ever uncover any evidence of
13 Murphy's abusive childhood or negligent upbringing?

14 A. Yes.

15 Q. Okay. And this was obviously something you considered
16 presenting and did present at trial, correct?

17 A. Yes.

18 Q. Through how many witnesses? Do you recall?

19 A. I think that Aunt Linda could talk about -- Linda Goodman
20 could talk about his childhood. His father knew something --
21 whatever is in the record. There wasn't anything that is --
22 the dad had known some stuff I don't think I was able to get
23 out of him when he was on the witness stand. That's just a
24 faint memory.

25 other than that, we put on what we had. Obviously,

1 we couldn't put on hearsay. We had -- we had a report that he
2 had been -- had been sexually abused and then had been a sexual
3 abuser from the time he was a child, so --

4 Q. But you were unable to substantiate that? Is that why you
5 did not --

6 A. I mean, it wasn't that. We didn't have any witness to it.
7 We did not -- it was a joint effort or a joint decision,
8 including the Defendant, that he would not testify. So, he
9 couldn't talk about it.

10 And I don't -- whatever is in the record was what we
11 were able to put forward and then kind of get a little in
12 through Dr. Vigen.

13 Q. Dr. Vigen ended up testifying to that effect, did he not?

14 A. Right.

15 Q. Okay. So, the jury -- with regard to at least sexual
16 abuse that Mr. Murphy may have suffered, the jury at least
17 heard that from one witness, being Dr. Vigen; is that correct?

18 A. Right.

19 Q. Okay. Is there anything from Mr. Murphy or his family or
20 that you gathered through your investigation that would have
21 indicated that Mr. Murphy suffered from posttraumatic stress
22 disorder?

23 A. That was never mentioned in connection with any of the
24 evaluations or family members. That bunch wouldn't have known
25 what that was, so, no.

1 Q. Okay. But you had hired, as you testified, several
2 psychological experts who evaluated Mr. Murphy?

3 A. Yes, sir.

4 Q. Did any of them diagnose him with posttraumatic stress
5 disorder?

6 A. No.

7 Q. Do you have any reason to doubt their diagnosis or --

8 A. I relied on them. So, no, I don't have any reason to
9 doubt it.

10 Q. Okay. And those experts again were Lisa Clayton, and she
11 was a general --

12 A. Psychiatrist.

13 Q. She's a psychiatrist?

14 A. Yes. Forensic psychiatrist.

15 Q. Okay. And Laura Lacritz was a psychologist?

16 A. She -- yeah. She did some -- some neuro testing. She is
17 an associate director of the Department of Psychiatry,
18 Neuropsychology. She's a Ph.D. at Southwestern -- what was
19 Southwestern Medical School at the time.

20 Q. And you mentioned Dr. Jay Crowder. Did he evaluate
21 Murphy?

22 A. I don't have his report, but he would have done the
23 physical testing of the brain -- or examination.

24 Q. And Dr. Vigen is also a clinical psychologist. Did he
25 evaluate Mr. Murphy?

1 A. Yes, he did.

2 Q. So, you had no less than three, possibly four experts
3 evaluate Mr. Murphy?

4 A. And the evaluation that was done at TDC while he was
5 there.

6 Q. And what did that evaluation say?

7 A. If I may? That's in my file as well.

8 THE WITNESS: If I may, Your Honor.

9 THE COURT: Yes.

10 well, any objection?

11 MR. DOW: I have no objection.

12 (Pause)

13 A. I looked through this last night. My recollection, that
14 there was -- I mean, I did look for posttraumatic stress
15 disorder. It was not diagnosed when he was considered for the
16 sex offender treatment program at TDC. And they did a pretty
17 thorough report, and they came to many of the same conclusions
18 that the experts that I had hired had concluded: borderline
19 personality disorder, if I'm not mistaken, antisocial
20 personality disorder. And it outlined some -- most of the same
21 abuse that had been reported to us.

22 Q. So, the report that you had mentioned from Dr. Vigen after
23 looking through your trial notes concerning his diagnosis of
24 certain disorders -- I believe there was a sexual disorder,
25 narcissistic disorder, antisocial disorder. Were these all

1 testified to at Murphy's trial ultimately?

2 A. I believe so, but the record will reflect.

3 Q. Okay. So most, if not all, of the things that Vigen
4 reported to you was explained to the jury?

5 A. Yes.

6 Q. Okay. So, in your investigation you found evidence of
7 neglect and abuse, a neglected childhood and some mental
8 disorders of some sort?

9 A. (Indicating in the affirmative)

10 Q. Do you believe that you presented this evidence
11 effectively to the jury?

12 A. Well, I hope so. I did the best that could be done, in my
13 opinion.

14 Q. After the investigation that you and your team undertook,
15 can you explain again the strategy that you developed for the
16 punishment phase?

17 THE WITNESS: I'll have to have some more water. I'm
18 sorry.

19 MR. GREENWELL: Okay. If you're out, I have some
20 over here.

21 MR. DOW: Yeah, we're out over here.

22 THE WITNESS: This allergy medicine makes me dry-
23 throated.

24 (Pause)

25 A. The strategy for mitigation, is that the question?

1 Q. Or for the punishment phase in general.

2 A. Punishment phase. Well, as I said, we wanted to establish
3 for the jury that the Defendant was not -- was kind of an
4 ineffective criminal, kind of a dufus; that he wasn't the
5 ringleader, although he was the oldest; that he did not
6 participate in any of the violence that occurred when they were
7 released; that he had a terrible childhood and that that was
8 the reason that he was making the -- had made the bad decisions
9 that he had made; to make him sympathetic and to distance him
10 from the really bad criminals that he escaped with.

11 Q. And that was just part of the strategy; is that correct?

12 A. Well, right.

13 I mean, even TDC, when they had escaped, had ranked
14 the defendants in order of dangerousness. On all those lists
15 Murphy was the least dangerous. One list they even forgot
16 about him and left him off.

17 So, you know, we were trying to -- and it's difficult
18 to make a case for won't be a future danger when they escape
19 from prison and a police officer has died, obviously. So, the
20 strategy was to make him sympathetic.

21 Q. And you did this not only to show that he was a follower,
22 but did you also present evidence of his upbringing in order to
23 sympathize him more in the jury's eyes?

24 A. Certainly.

25 Q. And also evidence of his mental health issues?

1 A. Yes.

2 Q. Through the testimony of Dr. Vigen, correct?

3 A. Yes.

4 Q. Okay. One more question concerning your investigation.
5 Again, the allegation against you is that not enough time was
6 spent in your investigation. Do you believe this to be true?

7 A. No.

8 Q. Okay. As an exhibit, Counsel has submitted a timesheet.
9 Is that the only timesheet you had submitted in this case?

10 A. I don't know.

11 Q. Okay.

12 A. As I say, I went back to the auditor. They destroyed them
13 after seven years. I don't have these records.

14 Q. Okay.

15 A. So, I don't know.

16 Q. Okay. Part of your mitigation strategy was to present
17 S.O. Woods, as you spoke to before?

18 A. Yes.

19 Q. Did you speak with -- or for how long did you speak with
20 Mr. Woods prior to his testimony?

21 A. I can't remember, but I remember that we went over his
22 testimony several times, but length of time I'm not sure.

23 Q. What was the initial purpose of consulting with Mr. Woods?

24 A. Well, he was newly available. He had stated that he would
25 like to -- or he would be amenable to testifying for the

1 defense, which is something I didn't actually ever expect.

2 But I don't -- I can't say this for sure, because I
3 used him in the -- subsequent to this I used him again. But I
4 don't know if he met Dr. Vigen because Dr. Vigen was interested
5 in his statistics of classification and recidivism, or it came
6 to my attention somehow that he would testify.

7 But they -- they began a dialogue. And he went down
8 to TDC, Dr. Vigen, and worked with Mr. Woods. And he reported
9 to me that S.O. Woods could say that Patrick Murphy would not
10 be a danger in TDC. And I thought that would be very valuable,
11 because he's -- he's a warden, so to speak, in TDC, and he was
12 the one who designed the classification system.

13 Everybody else who was going to come down and testify
14 was basing their -- the State's witnesses, if there were some,
15 would be basing their -- would have been trained by S.O. Woods
16 to classify people. And so I thought it would be very damaging
17 to the State to have him come and say in his opinion, which
18 was, you know, coming from God as far as the classification was
19 concerned, that he did not think that Mr. Murphy would be a
20 danger in the penitentiary.

21 So, I thought he would be a great witness. It hadn't
22 been -- it was something they -- that hadn't been tried before.
23 Q. Okay. So, to paraphrase, Mr. Woods was there to basically
24 bolster a strategy that Murphy would not be a continuing danger
25 to society should he be locked away for life as opposed to

1 given a death sentence?

2 A. Exactly.

3 Q. Okay. Do you believe his testimony accomplished that?

4 A. I think it established that, yes. Whether it accomplished
5 anything, obviously not.

6 Q. Okay. Now, Mr. Woods stated at some point during trial
7 that he believed Mr. Murphy was a -- I believe was a very bad
8 man or something?

9 A. Or dangerous man.

10 Q. Very dangerous man.

11 was that something you elicited during your direct
12 examination?

13 A. My recollection is, is that Toby Shook got him out of
14 him --

15 Q. Okay.

16 A. -- to spontaneously say that. It was disappointing.

17 Q. Okay. So, let me ask you this. It's been alleged that
18 there is no possible professional justification for hiring
19 Mr. Woods. Do you believe that to be true?

20 A. Oh, no. I think that he's -- for the reasons I just
21 stated, it was very helpful, because he's the one who designed
22 the system that had been -- that has stood the test of time and
23 is still in place now for TDC, and indeed other states have
24 copied his system.

25 To say who's dangerous and who's not, it's very --

1 it's believed to be very predictive. And so I felt that, you
2 know, here's the guy that makes those decisions at TDC, and he
3 says he doesn't think he will be a danger in TDC. So, I
4 thought, wow, that answers their question from -- really from
5 the other side.

6 Q. And, in fact, you stated you had used Mr. Woods subsequent
7 to this case?

8 A. I did use him again. I used him in -- I don't -- I don't
9 think he testified in Lizcano, but I put him on -- he might
10 have. I put him on a second time, only I worked even harder
11 with him to make sure that he was prepared more for
12 cross-examination, because he had never said that to me prior
13 to the time that he blurted that out in cross-examination. And
14 he was a very good witness.

15 Q. Let me switch gears real quick and ask you, at any point
16 since you were appointed counsel did you ever consider filing a
17 motion for a change of venue?

18 A. Originally, we all wondered if we should file a change of
19 venue. The problem with that was it wasn't a local story. One
20 defendant -- was it Michael Rodriguez? I can't remember. But
21 one defendant did file a motion for change of venue, which was
22 granted by the Court; and he ended up in a much, much worse
23 situation than he was.

24 You would have had to have gone to another county in
25 Texas, and every county in Texas had received the same coverage

1 and the same news interest that Dallas had. It was a national
2 story at the time. It was quite notorious.

3 And so we considered it, but based on what would have
4 happened if we had filed that -- and I'm pretty sure -- you'll
5 have to ask Mr. Sanchez to verify this. I think we discussed
6 it with the Defendant.

7 But Dallas County juries are more liberal, if you
8 will, than the jury that the Judge would have transferred the
9 case to, Mount Pleasant. I can't think of the name of the
10 county. But he transferred the case on the motion of -- I
11 think it was Keith Hampton, who represented that gentleman, to
12 a jurisdiction where the primary employer was the Texas
13 Department of Corrections. In fact, I think they ended up with
14 a prison guard on their jury. So, it seemed ill advised to me.
15 And I didn't really feel that there were grounds for a motion
16 for change of venue.

17 Q. So, it was something you did consider --

18 A. I considered it.

19 Q. -- and ultimately chose not to do?

20 A. But it seemed like -- yeah, because it would have been
21 deleterious to him as far as picking a jury. We would have had
22 a much more conservative and death-leaning jury than we could
23 get in Dallas.

24 Q. Okay. That is all the specific questions I have at the
25 time. I assume you have looked at the allegations that have

1 been made against you?

2 A. I did earlier, not in the last week.

3 Q. Is there anything you would like to add regarding those
4 that I haven't asked you? I like to give witnesses an
5 opportunity in case I'm missing something.

6 A. I can't think of anything.

7 Q. Okay.

8 A. I'm happy to answer any questions.

9 Q. Well, thank you, Ms. Busbee.

10 MR. GREENWELL: That's all I have, Your Honor.

11 THE COURT: Okay. Mr. Dow?

12 REDIRECT EXAMINATION

13 BY MR. Dow:

14 Q. Just a few questions, Ms. Busbee. You said in answer to a
15 question that Mr. Greenwell asked you that you conducted part
16 of the mitigation investigation yourself prior to the time that
17 Dr. Vigen got involved. Did I understand you correctly to say
18 that?

19 A. Yes.

20 Q. And you commented on the number of witnesses that you
21 interviewed. How long did you interview each of those
22 witnesses?

23 A. I spent a significant amount of time with Aunt Linda and
24 the cousin out there. I talked to them several hours. And
25 then when they came -- we brought them back or flew them in to

1 Dallas and spent additional time with them. But that, of
2 course, was with Dr. Vigen.

3 I had two interviews with the brother, maybe three
4 prior to the time that Mr. -- Dr. Vigen became involved. Those
5 interviews would have been an hour, maybe hour and a half. The
6 other one was so much shorter, as I recall.

7 These are people that are really, really simple, and
8 there's just not that much that you can obtain from them.
9 Dr. Vigen, of course, because he's a skilled interviewer, was
10 able to get more information out of them.

11 But I myself, the best to my recollection, those are
12 the people I talked to prior to the time we got a mitigation
13 expert.

14 Q. And you don't have any reason to believe that your billing
15 records are incomplete with respect to the number of people you
16 interviewed or the time that you spent interviewing them, do
17 you?

18 A. I don't know. I don't know. I mean, I know what I did.
19 I don't know -- and I know I like to get paid for what I do,
20 but I can't say, because I don't -- I don't have those records.

21 Q. At the time of Mr. Murphy's trial, did you have any
22 mitigation investigation training?

23 A. No.

24 Q. Is it your testimony, Ms. Busbee, that at the time of
25 Mr. Murphy's trial there was nobody in the Dallas area who had

1 training as a mitigation investigator?

2 A. No, I'm not saying that. I'm saying there was nobody that
3 I could find that I had confidence in. I don't know that there
4 was official training for mitigation experts at that time or
5 who would have administered it if there was. I mean, as we
6 know, you can get online now and get a degree in practically
7 anything. It doesn't mean that you would be good at your job.

8 So, I relied on -- I relied on people that I had
9 respect for. I wanted to hire somebody that I would feel
10 confident putting them on the witness stand, in other words,
11 somebody that I felt had -- was honest and would do a good job,
12 and that's what I found in Dr. Vigen.

13 Q. Is it fair to say that Mr. -- that Dr. Vigen's experience
14 as a mitigation investigator played a role in your decision to
15 hire him?

16 A. There were no people with experience. As far as I know,
17 this was the first time in Texas that we had mitigation
18 experts.

19 Some that I might have used were used by the
20 previous -- the previous Texas Seven, and I could not use them
21 because they were conflicted. And other people I would not
22 use, because I did not have any confidence in their abilities.

23 I had -- I met with Dr. Vigen. I talked with him.
24 He came to Dallas, and I talked to him about it, and I was
25 happy with him based on what I determined in our interview and

1 based on what Dr. Cunningham had told me.

2 Q. I just want to be clear in understanding what your
3 thinking was in hiring Dr. Vigen. Are you saying that at the
4 time you hired Dr. Vigen to your knowledge there was nobody
5 trained as a mitigation investigator who was available to hire?

6 A. I don't know that. I'm telling you I got a slew of people
7 telling me that they were mitigation investigators. I was
8 reading records from lawyers that I respected who had used
9 psychologists as mitigation experts.

10 People I spoke with, everyone seemed to think that a
11 psychologist would be an ideal mitigation expert because they
12 would be able to make the interviews, and they would be
13 knowledgeable about the testing, and they would be a good
14 person to guide defense counsel in putting on a mitigation
15 phase.

16 But there's a large range of experts in the field of
17 psychology, and some of them, you know, I would never use in a
18 case. Some of them -- I can name you some -- I won't -- in
19 Dallas that I would never use. They are known not to be
20 reliable. They're known -- their opinions are for hire. They
21 would have been easily destroyed on cross-examination if they
22 were put on the witness stand.

23 Dr. Vigen had excellent, excellent psychological or
24 psychology experience and education. He had worked in prisons.
25 I'm looking at his CV right now. He had consulted with police

1 departments. He had been a clinical professor of neurology.
2 He seemed to be -- and I did not find anything to the
3 contrary -- a very good choice as a mitigation expert.

4 Q. I'm sure that he has a very impressive resume, Ms. Busbee.
5 I'm simply trying to determine whether at the time that you
6 hired him the reason that you hired him is because you believed
7 that there were no potential candidates who had training as
8 mitigation investigators.

9 You would agree with me, would you not, that
10 Dr. Vigen had no specific training as a mitigation
11 investigator?

12 A. Yeah, I will.

13 Q. And you hired him knowing that?

14 A. I did not know of anybody who had a -- that there -- who
15 had at that time any specific accepted -- accepted training in
16 mitigation.

17 Q. So, the reason that you did not hire a mitigation
18 investigator is because you did not know anybody who had that
19 training at the time of Mr. Murphy's trial?

20 A. Right. I couldn't find anybody that was -- when you say
21 training, I don't know what that means, because training could
22 be "I went to a course and I paid \$200.00 and now I'm a trained
23 mitigation expert."

24 There could be people who claim that they were
25 trained. I was not satisfied, based on what people were

1 sending me of trying to solicit this business, that they would
2 have been an effective mitigation investigator or -- and/or
3 witness.

4 Q. Were there people who you considered hiring at the time of
5 Mr. Murphy's trial who held themselves out to you as trained
6 mitigation investigators?

7 A. That I considered hiring? No.

8 Q. Was there anybody -- you referred a moment ago to
9 unsolicited letters and resumes that you were getting. Do you
10 recall receiving an unsolicited letter or resume from anybody
11 who held him or herself out as a trained mitigation
12 investigator in a capital case?

13 A. Oh, yes. I -- some of them had, you know, brochures and
14 folders and things, but they -- they weren't convincing.

15 Q. So, at the time of Mr. Murphy's trial, based on
16 unsolicited letters and brochures that you received from
17 people, you were aware that there were people who were trained
18 mitigation investigators. Is that what you just said?

19 A. Well, I don't remember what they said in their things.
20 I -- some of them seemed incredibly cheesy, if that's a word.
21 That's just a word that comes to mind. "I used to be a police
22 officer, and I can -- I can do your mitigation investigation."
23 Junked. You know, that kind of thing. And there would be
24 people like from different states trying to solicit that
25 business, but --

1 Q. Well, let me ask you this, Ms. Busbee. Are you aware
2 today what someone who claims to be a trained mitigation
3 investigator is claiming as a credential?

4 A. I do -- you know what? I do know that, but I couldn't
5 tell you right now. I know that they do training, because I
6 have been involved in discussing this with the MCLAP, the
7 Mexican Capital Legal -- that's what we went through on
8 Lizcano. That was one of our concerns.

9 we needed a Spanish speaker. We needed an
10 investigator. This woman had not gone fully through the
11 training, so she was guided by someone who had been through all
12 the training.

13 So, yes, I do know that now. I don't think that
14 existed then. If it did, I wasn't aware of it.

15 Q. That is my question for you; that when you hired
16 Dr. Vigen, you were not aware of anybody who was a trained
17 mitigation investigator as you understand the phrase "trained
18 mitigation investigator" to refer to someone today?

19 A. Right.

20 Q. Can you remind me the names of the three capital murder
21 trials where you've been the lead counsel since the time that
22 you represented Mr. Murphy?

23 A. Let's see. Lizcano. And I was second chair in Kenneth
24 Thomas and second chair in John Wade Adams.

25 Q. So, the lead in Lizcano?

1 A. Uh-huh.

2 Q. Did you hire Dr. Vigen in the Lizcano case?

3 A. Not as a mitigation investigator. I hired him --

4 Q. I mean as the mitigation investigator. Have you ever
5 hired Dr. Vigen as the mitigation investigator since the Murphy
6 trial?

7 A. No.

8 Q. You refer to a psychological diagnosis that was done of
9 Mr. Murphy at TDCJ?

10 A. Yes, sir.

11 Q. Did that diagnosis rely on the facts that your team
12 discovered about Mr. Murphy during the course of your
13 mitigation investigation?

14 A. It did -- once again, I glanced at it last night. But it
15 had an almost completely similar account of his early years of
16 abuse and abusive behavior, so --

17 Q. Do you have any reason to believe that anybody at TDCJ
18 interviewed any members of Mr. Murphy's family --

19 A. No.

20 Q. -- in arriving at a psychological diagnosis?

21 A. No, I don't think they would have, but I don't know. I'll
22 be happy to find that report and let you take a look at it if
23 you would like.

24 Q. Did you hire Mr. Woods in the Lizcano case?

25 A. Yes.

1 Q. What did he testify to in the Lizcano case?

2 A. I don't remember. And I don't even remember if he
3 actually testified. At that point Dr. Sorenson had done a
4 statistical analysis and come up with a formula for future
5 dangerousness. I don't know -- I would have to look and see if
6 we put him on or just relied on what he said as the basis for
7 Dr. Sorenson's opinion.

8 But I have put him on on somebody since then, and it
9 may be -- I don't remember which one, but it might have been
10 John Wade Adams who actually ended up with a life sentence on
11 retrial, on his retrial.

12 Q. Who was the first chair in the Adams case?

13 A. Brad Lollar.

14 Q. Is it your understanding, Ms. Busbee, that until the
15 Supreme Court decided *Wiggins* it was not incumbent upon trial
16 lawyers representing capital defendants to conduct a mitigation
17 investigation?

18 A. No, I didn't say that. It was incumbent upon us to
19 conduct a mitigation investigation. It was not incumbent upon
20 us to obtain an expert to assist us in that.

21 Q. You're aware, are you not, that the Supreme Court's
22 decision in *Wiggins* relied in part on the ABA standards for
23 representation in capital trials?

24 A. I am aware of that.

25 Q. Do you believe that at the time of the Murphy trial the

1 ABA guidelines required you to hire experts in order to conduct
2 a mitigation investigation?

3 A. You know what? I don't recall that. I know that they
4 have changed since then, so --

5 Q. Did you consult the ABA guidelines at the time of
6 Mr. Murphy's trial?

7 A. I don't think so.

8 MR. DOW: That's all I have, Judge.

9 THE COURT: All right.

10 MR. GREENWELL: Just one question, Your Honor.

11 THE COURT: Okay.

12 RECROSS-EXAMINATION

13 BY MR. GREENWELL:

14 Q. Ms. Busbee, you said you didn't consult the ABA
15 guidelines. To your knowledge, at the time of trial are you
16 required to follow the ABA guidelines?

17 A. Well, I don't think -- I don't think so. I mean, I was
18 aware of them, obviously, and made more aware of them because
19 of the *wiggins* decision. I don't know where we would have
20 spent any extra time doing anything else. That was a -- there
21 were a limited number of people who knew him. We got all the
22 records that were obtainable. We did everything that in my
23 opinion was possible, so any additional time spent would have
24 been unnecessary.

25 Q. These are guidelines and not rules, correct?

1 A. Well, they are called guidelines.

2 Q. Exactly.

3 MR. GREENWELL: No further questions.

4 THE COURT: All right. Mr. Dow, anything further
5 from this witness?

6 MR. DOW: Nothing more, Judge.

7 THE COURT: All right. Can Ms. Busbee be excused as
8 far as --

9 MR. GREENWELL: Yes, Your Honor.

10 THE COURT: All right. Ms. Busbee, thank you for
11 your testimony and coming down this morning.

12 THE WITNESS: Thank you, sir.

13 THE COURT: You're excused.

14 (Witness excused)

15 THE COURT: All right. Let's take a -- Mr. Dow,
16 who's your next witness going to be?

17 MR. DOW: Our next witness and last witness is going
18 to be Allan Fishburn.

19 THE COURT: Oh, okay. All right. Very good. Let's
20 take a 10-minute break.

21 MR. GREENWELL: Your Honor, one quick thing.

22 THE COURT: Yes, sir.

23 MR. GREENWELL: Are you not going to call
24 Mr. Sanchez?

25 MR. DOW: I'm not going to call Mr. Sanchez.

1 MR. GREENWELL: Can you go ahead and agree to release
2 him?

3 MR. DOW: Yeah.

4 MR. GREENWELL: He probably has other things to do.

5 MR. DOW: Yes.

6 THE COURT: Okay. All right. So, no one is going to
7 call Mr. Sanchez.

8 Okay. All right. Mr. Sanchez, thank you for making
9 yourself available today and being here.

10 (Pause)

11 THE COURT: Let's take a 10-minute recess, and we'll
12 come back and pick up with Mr. Fishburn, then.

13 SECURITY OFFICER: All rise.

14 (Recess from 11:06 to 11:16)

15 SECURITY OFFICER: All rise.

16 THE COURT: You may be seated.

17 All right. Before you call Mr. Fishburn, again, I'm
18 not asking for a commitment on this. And live testimony, I
19 would never ask anyone to predict with certainty about live
20 testimony, but do you-all think that we will likely be able to
21 finish up with Mr. Fishburn's testimony and the hearing without
22 the need for a full lunch break or -- I don't know what your
23 expectations are at this point.

24 MR. DOW: We have really very little for
25 Mr. Fishburn.

1 THE COURT: Okay. All right.

2 MR. GREENWELL: Yeah, I don't think that would be a
3 problem at all, Your Honor.

4 THE COURT: Okay. All right. I'm just trying to
5 anticipate where we may be going. I'm available all day, so
6 it's not an issue, but --

7 All right. Mr. Dow?

8 MR. DOW: We call Allan Fishburn, Judge.

9 THE COURT: Okay.

10 (Pause)

11 THE COURT: Good morning, Mr. Fishburn. If you would
12 raise your right hand.

13 (The witness was sworn)

14 THE COURT: Thank you.

15 ALLAN FISHBURN, PETITIONER'S WITNESS, SWORN

16 DIRECT EXAMINATION

17 BY MR. DOW:

18 Q. Will you please state your name for the record,
19 Mr. Fishburn?

20 A. Allan Fishburn.

21 Q. Mr. Fishburn, I'm David Dow. I represent Patrick Murphy
22 in his federal habeas proceedings. Have we met before?

23 A. We have not.

24 Q. What was your role in representing Mr. Murphy?

25 A. I wrote the death penalty writ.

1 Q. For the sake of the record, the State habeas writ?

2 A. That's correct.

3 Q. If I refer to that State habeas writ as the 11.071, will
4 you know what I'm referring to?

5 A. I will.

6 Q. Do you remember when you were appointed to represent
7 Mr. Murphy?

8 A. I do not.

9 Q. Do you recall approximately how long between the time that
10 you were appointed and the time you filed the writ how much
11 time elapsed?

12 A. No, but I know that I violated the time limit for filing
13 the writ. I did that on purpose.

14 Q. Can you explain why you purposefully violated the time
15 limit?

16 A. Because I think that the time limit potentially chills the
17 death penalty writ lawyer from asserting that the direct appeal
18 lawyer was effective or ineffective, because the writ is due
19 before the -- before the mandate issues on the direct appeal,
20 so I figured that if I filed it late and the sanctions were
21 imposed I would have something to hand the federal writ lawyer
22 to use.

23 Q. Were sanctions imposed?

24 A. No. They just accepted the writ.

25 Q. Did you raise any claims regarding the effectiveness of

1 direct appeal counsel?

2 A. I did not.

3 Q. Did you read the brief that was filed by the direct appeal
4 counsel prior to filing the 11.071 writ?

5 A. Yes.

6 Q. Did you identify any issues that if you had been the
7 direct appeal counsel you would have raised that were not
8 raised?

9 A. No.

10 Q. I notice in your billing records, Mr. Fishburn, that you
11 have entries for legal research involving the case of *Enmund*
12 *against Florida* and *Tison against Arizona*.

13 A. Yes.

14 Q. I don't mean to be conducting a quiz here, but do you
15 remember while you are sitting there what those cases deal
16 with?

17 A. No.

18 Q. Do you recall raising a claim in the 11.071 under either
19 Tison or Enmund?

20 A. I do.

21 Q. So, you recall raising the claim. You just don't remember
22 what it is?

23 A. I don't. I did not reread my writ.

24 Q. Okay. Did you have an evidentiary hearing in the State
25 court with respect to your 11.071?

1 A. I did not.

2 Q. Did you request one?

3 A. I did not.

4 Q. Have you filed 11.071 applications for death-sentence
5 inmates in other cases besides Mr. Murphy's?

6 A. I have not.

7 Q. At the time that you were appointed to represent
8 Mr. Murphy in his 11.071 proceeding, do you recall how the list
9 of attorneys eligible to handle 11.071 cases was maintained?

10 A. I think it was maintained by the Court of Criminal
11 Appeals.

12 Q. And did you have to take affirmative steps to get on that
13 list?

14 A. I did.

15 Q. Are you still eligible to do 11.071 --

16 A. I'm not --

17 Q. -- applications?

18 A. I'm sorry. I'm not -- I haven't because I have chosen not
19 to remain qualified.

20 Q. Had you done 11.071 applications prior to Mr. Murphy's?

21 A. No.

22 Q. So, just to make sure I'm understanding, Mr. Murphy is the
23 only death-sentence prisoner you have represented in State
24 habeas proceedings; is that correct?

25 A. Yes.

1 MR. DOW: May I approach the witness, Judge?

2 THE COURT: You may.

3 (Pause)

4 MR. DOW: I'm not going to move to admit this, Judge.
5 It's just the State habeas petition.

6 THE COURT: Okay. Thank you.

7 BY MR. DOW:

8 Q. I have handed you -- I have handed you, Mr. Fishburn, a
9 copy of the State habeas application in Mr. Murphy's case.
10 Does that look familiar to you?

11 A. Yes.

12 Q. If you look at the index of authorities on the fifth page,
13 the first case is *Clewis against The State*?

14 A. Yes.

15 Q. Do you see either *Enmund against Florida* or *Tison against*
16 *Arizona* in that list of authorities?

17 A. I do not.

18 Q. So, might you have been mistaken earlier when you said
19 that you raised a claim under *Tison* or *Enmund*?

20 A. Yes, I might have been mistaken. I might have raised the
21 claim but not by the name of the case. They may be the claim
22 itself -- or the theory of the claim may be in one of these
23 State cases. I don't recall.

24 Q. Do you remember how you went about the process of deciding
25 which claims you were going to include?

1 A. I read each of the five records of the prior trials. I
2 did research on each of the cases that was tried in the past,
3 the other five. I did research into what I believed the record
4 showed relating to the problems with Mr. Murphy getting a fair
5 trial under the Constitution.

6 I ascertained that from my investigation, my
7 knowledge of the prior lawyers involved, the knowledge of the
8 record, the fact that Murphy was tried last, that there would
9 be no ineffective assistance of counsel claim against trial
10 counsel.

11 Q. I want to talk a little bit about how you reached the
12 conclusion that there would be no ineffectiveness claim against
13 the trial counsel. Did you interview either of Mr. Murphy's
14 trial lawyers?

15 A. I did not.

16 Q. Did you interview anybody in connection with your
17 investigation?

18 A. I did not, except my client.

19 Q. Did you obtain the trial file from the trial lawyers?

20 A. I did not.

21 Q. Did you seek funding to hire any experts?

22 A. I did not.

23 Q. Mr. Fishburn, what does your practice principally consist
24 of today?

25 A. Mostly direct State appeals and felony trials.

1 Q. How would you characterize the difference between a direct
2 appeal and an 11.071 application?

3 A. A direct appeal is based on what happened in court, and an
4 11.07 or an 11.071 would be based partly on what happened in
5 court but also what happened outside the courtroom that might
6 be cognizable.

7 Q. In your investigation of the Murphy case, what did you
8 learn about what had happened outside the courtroom that might
9 be cognizable?

10 A. I didn't learn anything that would be cognizable outside
11 the courtroom in Murphy's case.

12 Q. What investigation did you undertake to try to learn
13 whether there was anything that happened outside the courtroom
14 that might have been cognizable?

15 A. I conducted no formal investigation at all.

16 MR. DOW: Pass the witness, Judge.

17 THE COURT: Okay.

18 CROSS-EXAMINATION

19 BY MR. GREENWELL:

20 Q. Hello, Mr. Fishburn. My name is Jeremy Greenwell. I
21 represent the Respondent in these proceedings.

22 As I did with Mr. Busbee, let me first ask, have you
23 and I ever spoken either in person or on the phone?

24 A. No.

25 Q. Have you ever been instructed by anyone from my office,

1 including me or anybody at this table, on how to testify today?

2 A. No.

3 Q. Even if we would, would you have listened to us?

4 A. No.

5 Q. Okay. So, your testimony is based purely on your
6 recollection of the case?

7 A. It is.

8 Q. Okay. How long have you been practicing law,
9 Mr. Fishburn?

10 A. Since December 14, 1984.

11 Q. Okay. And in those years has it been solely defense work?

12 A. I was staff attorney for the Felony District Judge in
13 Dallas County, Texas, for three years when I got out of law
14 school, and after that, yes.

15 Q. Okay. How many capital murder trials in general or as
16 appellate or trial counsel have you been involved with?

17 A. One direct appeal on Leon David Dorsey and Patrick Henry
18 Murphy.

19 Q. On Patrick Murphy?

20 A. Yes.

21 Q. What about as trial counsel?

22 A. None.

23 Q. We spoke a little bit or you spoke with Mr. Dow a little
24 bit about the 11.071 writ list. What exactly did you have to
25 do to become qualified to be on that list?

1 A. Judge Cunningham asked me to do the writ. I told him I --
2 I told him I wasn't on the list. He told me to get on the
3 list.

4 I looked at the Court of Criminal Appeals -- might
5 have been the website thing. I'm not sure. I found out what
6 they wanted and made my application, and they approved it right
7 away.

8 Q. Okay. Did you have to obtain any specialized training to
9 be on that list?

10 A. No, I didn't have to do anything other than make the
11 application.

12 Q. Just apply and be on the list?

13 A. Uh-huh.

14 Q. Okay. Well, you said you hadn't been involved in very
15 many capital murder trials. Have you been involved in many
16 murder trials?

17 A. Yes.

18 Q. How many, approximately?

19 A. I have no idea.

20 Q. Ballpark?

21 A. Trial or appeal?

22 Q. Both.

23 A. A couple hundred.

24 Q. Couple hundred?

25 A. Including appeals, yes.

1 Q. So, you're not a novice to felony murders by any stretch
2 of the imagination, are you?

3 A. No.

4 Q. Okay. Let's skip forward to what you did in Mr. Murphy's
5 case here. I'm sure you're aware the gist of Mr. Murphy's
6 accusation is that you didn't prepare adequately for this and
7 file a sufficient writ.

8 Let's talk about the investigation. Can you explain
9 what, if any, investigation you did or what procedure you went
10 through prior to filing this writ?

11 A. Just as I said before on direct, the same.

12 Q. Okay. Can you elaborate any further?

13 A. No.

14 Q. Okay.

15 MR. GREENWELL: Your Honor, may I approach?

16 THE COURT: You may.

17 (Pause)

18 MR. GREENWELL: This has already been made part of
19 the record. It's Docket Entry 35, Exhibit 2.

20 THE COURT: Okay.

21 MR. GREENWELL: It is Mr. Fishburn's expense report.

22 THE COURT: Okay.

23 MR. GREENWELL: So, I'm not going to submit it as an
24 exhibit.

25 MR. DOW: We have it.

1 MR. GREENWELL: You have it already?

2 (Pause)

3 THE COURT: Thank you.

4 BY MR. GREENWELL:

5 Q. Mr. Fishburn, feel free to take a moment if you need to
6 refresh your memory. If not --

7 A. It looks familiar.

8 Q. Okay. It looks familiar.

9 On the front page you see where it states you
10 submitted a bill for over 300 hours of work --

11 A. That's correct.

12 Q. -- on the petition?

13 Other than what you stated before, is there anything
14 specific that you worked on in these 300 hours?

15 A. Not that I recall.

16 Q. Okay. Do you recall in preparing this petition ever
17 considering raising an allegation that trial counsel performed
18 inefficiently?

19 A. I considered it, but I immediately decided not to raise it
20 because it wasn't there.

21 Q. Okay. Well, I would like to go into it a little further.

22 On page 14 it states you spent three hours on
23 *Strickland versus Washington*. That's the standard by which
24 these claims are evaluated, correct?

25 A. Yes. That's correct.

1 Q. And on page 17 you again referenced *Strickland* for three
2 hours you spent concerning trial counsel's voir dire
3 performance; is that correct?

4 A. That is correct.

5 Q. Okay. And on page 12 you spent a few hours on a
6 commitment objection to the State's voir dire example, for lack
7 of a better term; is that correct?

8 A. That's correct.

9 Q. Okay. So, this indicates that you at least considered
10 raising ineffective assistance of counsel claim about voir dire
11 at least, correct?

12 A. Yes.

13 Q. Okay.

14 A. But there's so little time overall compared to what I
15 turned in on my timesheet was actually spent. That's why I
16 stated it the way I just did.

17 Q. Okay. Just for posterity's sake, page 9 and 13, you also
18 mentioned the term "mitigation," for a total of four hours.
19 Would that possibly indicate you were investigating errors
20 counsel may have made during the punishment phase?

21 A. It may indicate that. Yes, it may indicate that.

22 Q. Okay. And on the last one, page 15, you spent a couple of
23 hours on "trial counsel's closing." Does that indicate you may
24 have been contemplating a claim concerning the way trial
25 counsel handled closing arguments?

1 A. It does indicate that.

2 Q. Okay. In light of these entries and your own
3 recollection, is it fair to say you at least investigated the
4 possibility of raising an ineffective assistance of counsel
5 claim?

6 A. Yes, I did, as I do with all direct appeals that I do, as
7 well as briefs I do.

8 Q. And you ultimately decided not to raise this for what
9 reason?

10 A. It wasn't there.

11 Q. It just wasn't there?

12 A. No.

13 Q. During your review of the records of the trial, certainly
14 you became aware that counsel presented numerous witness family
15 members, Dr. Vigen, S.O. Woods, having him evaluated by
16 numerous mental health professionals.

17 Did this affect your decision not to raise an
18 ineffective assistance of counsel claim?

19 A. Yes, in the overall picture, of course it did. I examined
20 every trial. I examined every witness. I read -- I read
21 everything that anyone else had done.

22 And if I might say, trial counsel's performance in
23 Murphy's case, after reading everything I read, I considered it
24 to be maybe first or second place if you wanted to grade them
25 that way. I saw no problem whatsoever.

1 Q. Okay. So, you believe they did a bang-up job, for lack of
2 a better term?

3 A. Yes, I do. I believe they did very well.

4 Q. Okay. On the issues you ultimately raised, do you believe
5 those were your strongest avenues left for appeal?

6 A. Yes.

7 Q. Okay.

8 (Pause)

9 MR. GREENWELL: May I approach again, Your Honor?

10 THE COURT: You may.

11 MR. GREENWELL: Now, this is a part of the State
12 habeas record as well, but we may want to introduce it because
13 it's kind of hard to name. So, we'll just introduce it as
14 Respondent's Exhibit 1, Your Honor.

15 THE COURT: Okay.

16 (Respondent's Exhibit No. 1 marked and received)

17 MR. GREENWELL: It's the hearing during the State
18 habeas writ.

19 THE COURT: Thank you.

20 (Pause)

21 BY MR. GREENWELL:

22 Q. Mr. Fishburn, do you remember this hearing?

23 A. I do, yes.

24 Q. Now, you stated you had spoken with Murphy before you
25 filed your petition. How many times did you speak with him?

1 A. I can't recall right now.

2 Q. Okay. Did you have any correspondence with him?

3 A. Yes.

4 Q. Okay. Do you recall the purpose of the hearing from which
5 I just gave you?

6 A. I do.

7 Q. And what was that purpose?

8 A. Judge Magnis had concerns whether or not my writ
9 application was sufficient.

10 Q. Okay. Was the purpose of the hearing to determine whether
11 Mr. Murphy would like to have new counsel appointed?

12 A. I believe that was part of it.

13 Q. Okay. Do you recall what your client's response to that
14 hearing was?

15 A. I don't recall a specific response, no, but I believe the
16 overall response was that he would like to keep me as his
17 lawyer.

18 Q. Okay. Did he ever tell you this personally?

19 A. Yes.

20 Q. Okay. So, even though he had a chance at this hearing to
21 have your performance evaluated, he ultimately voluntarily and
22 knowingly waived that chance and continued with your
23 representation?

24 MR. DOW: I object to that characterization, Judge.

25 MR. GREENWELL: I believe it's stated in the record.

1 THE COURT: The objection is overruled. It's a
2 question, but the Court can give the question and the answer
3 whatever weight it's due in light of the transcript itself,
4 so --

5 Mr. Fishburn, do you need the question repeated?

6 THE COURT: Yes, I do.

7 BY MR. GREENWELL:

8 Q. Do you remember Mr. Murphy ever handing you a note at the
9 end of that hearing?

10 A. I don't remember that.

11 Q. You don't remember.

12 Okay. You don't recall what that note said?

13 A. Could have. Maybe he did.

14 Q. Okay.

15 A. Maybe he did; maybe he didn't. I'm sorry.

16 Q. Okay.

17 MR. GREENWELL: That's all I have, Your Honor.

18 THE COURT: All right.

19 MR. DOW: Very briefly, Judge.

20 THE COURT: Sure.

21 REDIRECT EXAMINATION

22 BY MR. DOW:

23 Q. Mr. Fishburn, are you familiar with the case of *wiggins*
24 *against Smith*?

25 A. No.

1 Q. And so, therefore, if you conducted any investigation that
2 would be required by *wiggins versus Smith*, that would just be
3 an accident? You wouldn't have conducted an investigation
4 because it was required by *wiggins versus Smith*?

5 A. I wouldn't have gone looking for the *wiggins* holding or
6 its rationale in my work.

7 Q. Okay. Do you recall at the hearing that Mr. Greenwell was
8 just referring to the trial judge informing Mr. Murphy that if
9 you were replaced as habeas counsel and new habeas counsel were
10 appointed the Court of Criminal Appeals might treat whatever
11 that new counsel filed as a successive petition?

12 A. I don't recall that, but I have not read the record of the
13 hearing.

14 MR. DOW: Does he have a copy of the hearing in front
15 of him?

16 MR. GREENWELL: He does.

17 THE WITNESS: I do.

18 BY MR. DOW:

19 Q. Can you turn, if you would, Mr. Fishburn, to page 5 of
20 that document that Mr. Greenwell gave you?

21 A. Yes.

22 Q. On line 15 of page 5 where the Court says --

23 A. Uh-huh.

24 Q. -- "Now, I don't know -- in the event that were to occur,
25 if I had that hearing, your counsel withdraw and I appointed

1 new counsel, I don't know if new counsel would be able to
2 re-brief this without it being treated as a second writ or
3 not."

4 A. I see that.

5 Q. Would Mr. Murphy have been present in the courtroom at the
6 time that the Judge made that observation from the bench?

7 A. It is so indicated at line 11 the Defendant was present in
8 court. So, I assume at line 15 he was. And my recollection
9 indicates he was present at all times.

10 Q. Thank you, Mr. Fishburn.

11 MR. DOW: That's all I have, Judge.

12 THE COURT: All right.

13 MR. GREENWELL: No further questions, Your Honor.

14 THE COURT: All right. Can Mr. Fishburn be excused?

15 MR. GREENWELL: Yes, Your Honor.

16 MR. DOW: Yes.

17 THE COURT: Okay. Mr. Fishburn, thank you for coming
18 down this morning for your testimony. You may be excused.

19 (Witness excused)

20 THE COURT: Mr. Dow, do you have any additional
21 evidence?

22 MR. DOW: No further evidence, Judge.

23 THE COURT: All right. Mr. Greenwell?

24 MR. GREENWELL: No, Your Honor.

25 THE COURT: All right. Counsel like to be heard

1 with -- on argument on anything -- on any of the evidence today
2 or any of the other matters that were alluded to in the order
3 setting hearing?

4 MR. DOW: If it please the Court, I think that it's
5 clear that our position is that Ms. Busbee was ineffective in
6 hiring Dr. Vigen. If she had had not been ineffective, she
7 would have hired a different expert who would have been able to
8 diagnose PTSD.

9 I also think that it's clear that our position with
10 respect to Mr. Fishburn is that his behavior was such that
11 insofar as the merits of the allegations against Ms. Busbee are
12 persuasive that we come within the *Trevino* exception to the
13 procedural bar.

14 what I would prefer to do, rather than make the
15 merits of that argument right now, with the Court's permission,
16 is wait until there's a transcript of the proceedings so that
17 we can refer to specific passages in the examination, in
18 particular of Ms. Busbee, and then make the substantive
19 argument at that time.

20 THE COURT: Mr. Greenwell, any objection --

21 MR. GREENWELL: I have no objection.

22 THE COURT: -- to post-hearing brief?

23 Okay. I do think that probably makes sense to the
24 Court the most. So, I think it probably makes sense to trigger
25 the time for the post-hearing brief off of -- briefs off of the

1 filing of the transcript.

2 Mr. Dow, how much time do you -- would you request?

3 MR. DOW: If -- thirty days would be fine.

4 THE COURT: Okay.

5 MR. GREENWELL: That's plenty of time, Your Honor.

6 THE COURT: All right. Do y'all anticipate -- would
7 you anticipate doing simultaneous briefs, or would you ask that
8 they be seriatim?

9 MR. DOW: I prefer they be simultaneous --

10 THE COURT: Okay.

11 MR. GREENWELL: That's fine.

12 MR. DOW: -- due to the hearing.

13 THE COURT: I think that makes sense. So, I will
14 order that post-hearing briefs will be -- on the issues covered
15 by the hearing today will be due by 30 days from the date that
16 the transcript is filed. I think that makes a lot of sense.

17 Do y'all want reply briefs or -- to follow that, or
18 do you think that the one brief will --

19 MR. DOW: I think that it will cover everything we
20 need to cover in the brief. Obviously, if Your Honor wants to
21 hear from us after they're filed, we're certainly more than
22 happy to appear. But I don't anticipate we would need to file
23 anything additionally.

24 THE COURT: Okay.

25 MR. GREENWELL: Neither do I, Your Honor.

1 THE COURT: Okay. Well, I think that makes a lot of
2 sense.

3 All right. Well, yes, I will do sort of an
4 electronic order after this, setting the dates down for the
5 post-hearing briefs.

6 Anything further for today, then?

7 MR. GREENWELL: Your Honor, just one question.

8 THE COURT: Yes.

9 MR. GREENWELL: Would the post-hearing briefing be
10 simply just argument, or are we submitting proposed findings to
11 the Court, or a little bit of both?

12 THE COURT: Oh, I see. Well, you know, probably both
13 makes sense. And so I think proposed findings of fact,
14 conclusions of law, and then a brief to accompany it is often
15 helpful because -- well, most findings of fact, conclusions of
16 law are extremely helpful in my putting together my proposed
17 findings -- I mean, my findings and conclusions to Judge
18 Lindsay. It's -- yeah. It doesn't involve the same levels of
19 argument and -- we'll just stick to argument -- that the
20 briefing can. So, that's -- let's do that, then.

21 Mr. Dow, anything further for today?

22 MR. DOW: That's all, Judge. Thank you.

23 THE COURT: Okay. The only thing I did want to say
24 is it's very important to me to have less experienced lawyers
25 get experience in court, and I try as best I can to do that at

1 every turn in all the proceedings in front of me. And so it's
2 not with great joy that I had to ask that Mr. Dow take the
3 witnesses today rather than you. So, I just wanted to make
4 sure you understood that, and so --

5 MS. HICKMAN: I understand. Thank you very much,
6 Your Honor.

7 THE COURT: Of course. All right.

8 All right. Then we will be adjourned. Have a good
9 rest of the day.

10 MR. DOW: Thank you.

11 MR. GREENWELL: Thank you, Your Honor.

12 SECURITY OFFICER: All rise.

13 (Hearing adjourned)

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1 I, TODD ANDERSON, United States Court Reporter for the
2 United States District Court in and for the Northern District
3 of Texas, Dallas Division, hereby certify that the above and
4 foregoing contains a true and correct transcription of the
5 proceedings in the above entitled and numbered cause.

6 WITNESS MY HAND on this 16th day of September, 2015.

7
8
9 /s/Todd Anderson

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